NO. 17-16693

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ETOPIA EVANS, *et al.*,

Plaintiff – Appellants,

v.

ARIZONA CARDINALS FOOTBALL CLUB, LLC, *et al.*,

Defendants – Appellees.

Appeal from the Judgment of the United States District Court
for the Northern District of California
Case No. 3:16-cv-01030-WHA
(Honorable William H. Alsup)

PLAINTIFF-APPELLANT ETOPIA EVANS, *ET AL.* EXCERPTS OF RECORD VOLUME I

William Sinclair (CA Bar No. 222502)
SILVERMAN | THOMPSON | SLUTKIN | WHITE, LLC
201 N. Charles Street, Suite 2600
Baltimore, MD 21201
Telephone: (410) 385-2225
Facsimile: (410) 547-2432
bsinclair@mdattorney.com

Rachel Jensen (CA Bar No. 211456)
ROBBINS | GELLER| RUDMAN | DOWD, LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: (619) 231-1058
Facsimile: (619) 231-7423
rjensen@rgrdlaw.com

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

William N. Sinclair (SBN 222502)
(bsinclair@mdattorney.com)
Steven D. Silverman (Admitted *Pro Hac Vice*)
(ssilverman@mdattorney.com)
Stephen G. Grygiel
(sgrygiel@ mdattorney.com)
Phillip J. Closius (Admitted *Pro Hac Vice*)
(pclosius@ mdattorney.com)
Alexander Williams (Admitted *Pro Hac Vice*)
awilliams@mdattorney.com
SILVERMAN|THOMPSON|SLUTKIN|WHITE|LLC
201 N. Charles Street, Suite 2600
Baltimore, MD 21201
Telephone: (410) 385-2225
Facsimile: (410) 547-2432

Thomas J. Byrne (SBN 179984)
(tbyrne@nbolaw.com
Mel T. Owens (SBN 226146)
(mowens@nbolaw.com)
NAMANNY BYRNE & OWENS, P.C.
2 South Pointe Drive, Suite 245
Lake Forest, CA 92630
Telephone: (949) 452-0700
Facsimile: (949) 452-0707

Stuart A. Davidson (Admitted *Pro Hac Vice*)
(sdavidson@rgrdlaw.com)
Mark J. Dearman (Admitted *Pro Hac Vice*)
(mdearman@rgrdlaw.com)
Janine D. Arno (Admitted *Pro Hac Vice*)
(jarno@rgrdlaw.com)
ROBBINS GELLER RUDMAN & DOWD LLP
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: (561) 750-3000
Facsimile: (561) 750-3364

Attorneys for Plaintiffs

[Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ETOPIA EVANS, as the Representative of the Estate of Charles Evans, et al., Plaintiffs, vs. ARIZONA CARDINALS FOOTBALL CLUB, LLC, et al., Defendants.	Case No. 3:16-cv-01030-WHA AMENDED COMPLAINT

Plaintiffs, by and through undersigned counsel, file this Amended Complaint and in support thereof allege as follows:

NATURE OF THE ACTION

1. Plaintiffs bring this action for redress of injuries resulting from a conspiracy perpetrated by the 32 defendant clubs ("Clubs" or "Defendants") that comprise the National Football League ("NFL").

2. Beginning in the 1960s, professional football began to rival baseball as the country's national sport. Football is far-better suited for television – a veritable match made in heaven. And once the profits flowed from television, the Clubs began to realize the seemingly limitless revenues they could achieve.

3. At the same time, the individuals running the Clubs began to realize the necessity of keeping their best players on the field to ensure not only attendance at games but also the best possible TV ratings. That realization resulted in the creation of a return to play practice or policy by the Clubs that prioritized profit over players' health and safety.

4. Given the injuries inherent in the game, concern for the players' health should include giving them adequate rest, having fewer games, and keeping more players on the roster. But all of that would cut into profit. So the Clubs chose a different method to keep their players on the field.

5. As far back as the mid-1960s, Club doctors and trainers were providing players with pain killers, anti-inflammatories, and sleep aids ("Medications") to get them back in the game as soon as possible, despite being injured, and keep them there. Though the Medications have changed over the ensuing decades, the manner in which they have been distributed has not.

6. Players from around the country describe the same thing – Club doctors and trainers providing injections or pills, not telling the players what they were receiving, misstating the effects of the Medications (if they addressed the effects at all), and not talking about the need for informed

consent or the long-term effects of what they were taking. These doctors and trainers dispensed the Medications to their football patients in an amount and manner they would never do with their non-football patients.

7. These actions violate the federal Controlled Substances Act and/or Food Drug & Cosmetic Act, their implementing regulations, and analogous state laws. The Controlled Substances Act also incorporates by reference much of the provisions of the latter act. It is illegal to distribute controlled substances and medications requiring prescriptions in the manner described herein.

8. These illegal acts, and the intentional misrepresentations and omissions associated with these illegal acts and described herein, have taken place on every Club since at least the mid-1960s and the named Plaintiffs, as a group, have played for every Club in the NFL from 1976 to 2014.

9. All of the named Plaintiffs, save Reginald ("Reggie") Walker, bring intentional misrepresentation and civil conspiracy claims; all of the named Plaintiffs bring concealment claims; and Chris Goode, Darryl Ashmore, Jerry Wunsch, Alphonso Carreker, Steve Lofton, Etopia Evans, Duriel Harris, and a nationwide class of plaintiffs bring claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") against Defendants based on their illegal behavior.

JURISDICTION AND VENUE

10. This Court has original jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) because the proposed class consists of more than one hundred persons, the overall amount in controversy exceeds $5,000,000 exclusive of interest, costs, and attorney's fees, and at least one Plaintiff is a citizen of a State different from one Defendant. The claims can be tried jointly in that they involve common questions of law and fact that predominate over individual issues.

11. This Court also has original jurisdiction pursuant to 28 U.S.C. § 1331 and 18 U.S.C. § 1964(c).

12. This action was originally filed in the United States District Court for the District of Maryland and transferred to this Court upon Defendants' motion. Defendants thus waive any argument that this Court does not have personal jurisdiction over them. In any event, the Court does have Court have personal jurisdiction over Defendants because they do business in this District, derive substantial revenue from their contacts with this District, and because two of the Defendants, the Oakland Raiders, LLP and the Forty Niners Football Company, LLC, operate within this District.

13. Venue is proper pursuant to 28 U.S.C. § 1391(b)(1) because Defendants are entities with the capacity to sue and be sued and reside, as that term is defined at 28 U.S.C. §§ 1391(c)(2) and (d), in this District.

THE PARTIES

I. PLAINTIFFS DID NOT LEARN OF THE CAUSE OF THEIR INJURIES UNTIL WITHIN THE APPLICABLE STATUTES OF LIMITATIONS.

14. Plaintiffs suffer from three discrete sets of injuries directly caused by Defendants' intentional misrepresentations: (1) internal organ injuries; (2) muscular/skeletal injuries exacerbated by the Clubs' administration of Medications to keep players on the field or in practice; and (3) injuries to their business or property.

15. Plaintiff Etopia Evans is the widow, and Personal Representative of the Estate, of Charles Evans, a representative member of the putative class. As of the commencement of this action, Ms. Evans is a resident of Louisiana. Mr. Evans died while a resident of the State of Maryland. Mr. Evans played 107 games as a fullback for the Minnesota Vikings from 1993 – 1998 and the Baltimore Ravens from 1999 – 2000.

16. Based on the information currently available to Ms. Evans – which is greatly limited because: (a) she does not know all of the Medications that Defendants provided Mr. Evans, and (b) the Defendants possess most, if not all, of the information related to dosage units, frequencies and durations of administrations and correlated, documented side effects – she is aware that her husband

suffered from damage to internal organs and the muscular/skeletal injuries discussed above as well as injuries to his business or property. Ms. Evans did not become aware that Defendants caused those injuries until, at the earliest, March of 2014. Mr. Evans was not aware that Defendants caused those injuries at the time of his death.

17. Plaintiff Eric King is a representative member of the putative class. As of the commencement of this action, he is a resident of California. Mr. King played 63 games as a defensive back for the Buffalo Bills in 2005; the Tennessee Titans from 2006 – 2008; the Detroit Lions from 2009 – 2010; and the Cleveland Browns in 2010.

18. Based on the information currently available to Mr. King – which is greatly limited because: (a) he does not know all of the Medications that Defendants provided him, and (b) the Defendants possess most, if not all, of the information related to dosage units, frequencies and durations of administrations and correlated, documented side effects – at this time, the only injuries of which he is aware are the muscular/skeletal injuries discussed above. Mr. King did not become aware that Defendants caused those injuries until, at the earliest, March of 2014.

19. Plaintiff Robert Massey is a representative member of the putative class. As of the commencement of this action, he is a resident of North Carolina. Mr. Massey played 140 games as a defensive back for the New Orleans Saints from 1989 – 1990; the Phoenix Cardinals from 1991 – 1993; the Detroit Lions from 1994 – 1995; the Jacksonville Jaguars in 1996; and the New York Giants in 1997. He was selected to the Pro Bowl in 1992.

20. Based on the information currently available to Mr. Massey – which is greatly limited because: (a) he does not know all of the Medications that Defendants provided him, and (b) the Defendants possess most, if not all, of the information related to dosage units, frequencies and durations of administrations and correlated, documented side effects – at this time, the only injuries

of which he is aware are the muscular/skeletal injuries discussed above. Mr. Massey did not become aware that Defendants caused those injuries until, at the earliest, March of 2014.

21. Plaintiff Troy Sadowski is a representative member of the putative class. As of the commencement of this action, he is a resident of Georgia. Mr. Sadowski played 104 games as a tight end for the Atlanta Falcons in 1990; the Kansas City Chiefs in 1991; the New York Jets from 1992 – 1993; the Cincinnati Bengals from 1994 – 1996; the Pittsburgh Steelers from 1997 – 1998; and the Jacksonville Jaguars in 1998.

22. Based on the information currently available to Mr. Sadowski – which is greatly limited because: (a) he does not know all of the Medications that Defendants provided him, and (b) the Defendants possess most, if not all, of the information related to dosage units, frequencies and durations of administrations and correlated, documented side effects – at this time, the injuries of which he is aware are damage to internal organs and the muscular/skeletal injuries discussed above. Mr. Sadowski did not become aware that Defendants caused those injuries until, at the earliest, March of 2014.

23. Plaintiff Chris Goode is a representative member of the putative class. As of the commencement of this action, he is a resident of Alabama. Mr. Goode played 97 games as a defensive back for the Indianapolis Colts from 1987 – 1993.

24. Based on the information currently available to Mr. Goode – which is greatly limited because: (a) he does not know all of the Medications that Defendants provided him, and (b) the Defendants possess most, if not all, of the information related to dosage units, frequencies and durations of administrations and correlated, documented side effects – at this time, the injuries of which he is aware are damage to internal organs, the muscular/skeletal injuries discussed above, and injuries to his business or property. Mr. Goode did not become aware that Defendants caused those injuries until, at the earliest, March of 2014.

25. Plaintiff Darryl Ashmore is a representative member of the putative class. As of the commencement of this action, he is a resident of Florida. Mr. Ashmore played 123 games as an offensive lineman for the Los Angeles and St. Louis Rams from 1993 – 1996; the Washington Redskins from 1996 – 1997; and the Oakland Raiders from 1998 – 2001.

26. Based on the information currently available to Mr. Ashmore – which is greatly limited because: (a) he does not know all of the Medications that Defendants provided him, and (b) the Defendants possess most, if not all, of the information related to dosage units, frequencies and durations of administrations and correlated, documented side effects – at this time, the injuries of which he is aware are damage to internal organs, the muscular/skeletal injuries discussed above, and injuries to his business or property. Mr. Ashmore did not become aware that Defendants caused those injuries until, at the earliest, March of 2014.

27. Plaintiff Jerry Wunsch is a representative member of the putative class. As of the commencement of this action, he is a resident of Florida. Mr. Wunsch played 120 games as an offensive lineman for the Tampa Bay Buccaneers from 1997 – 2001 and the Seattle Seahawks from 2002 – 2004.

28. Based on the information currently available to Mr. Wunsch – which is greatly limited because: (a) he does not know all of the Medications that Defendants provided him, and (b) the Defendants possess most, if not all, of the information related to dosage units, frequencies and durations of administrations and correlated, documented side effects – at this time, the injuries of which he is aware are damage to internal organs, the muscular/skeletal injuries discussed above, and injuries to his business or property. Mr. Wunsch did not become aware that Defendants caused those injuries until, at the earliest, March of 2014.

29. Plaintiff Alphonso Carreker is a representative member of the putative class. As of the commencement of this action, he is a resident of Georgia. Mr. Carreker played 97 games as a

defensive end for the Green Bay Packers from 1984 – 1988 and the Denver Broncos in 1989 and 1991.

30. Based on the information currently available to Mr. Carreker – which is greatly limited because: (a) he does not know all of the Medications that Defendants provided him, and (b) the Defendants possess most, if not all, of the information related to dosage units, frequencies and durations of administrations and correlated, documented side effects – at this time, the injuries of which he is aware are damage to internal organs, the muscular/skeletal injuries discussed above, and injury to his business. Mr. Carreker did not become aware that Defendants caused those injuries until, at the earliest, March of 2014.

31. Plaintiff Steve Lofton is a representative member of the putative class. As of the commencement of this action, he is a resident of Texas. Mr. Lofton played 74 games as a defensive back for the Phoenix Cardinals from 1993 –1995, the Carolina Panthers from 1995 –1996 and in 1998 and 1999, and the New England Patriots from 1997 –1998. Mr. Lofton was injured for the 1994 season.

32. Based on the information currently available to Mr. Lofton – which is greatly limited because: (a) he does not know all of the Medications that Defendants provided him, and (b) the Defendants possess most, if not all, of the information related to dosage units, frequencies and durations of administrations and correlated, documented side effects – at this time, the injuries of which he is aware are damage to his internal organs, the muscular/skeletal injuries discussed above, and injury to his business or property. Mr. Lofton did not become aware that Defendants caused those injuries until, at the earliest, March of 2014.

33. Plaintiff Duriel Harris is a representative member of the putative class. As of the commencement of this action, he is a resident of Louisiana. Mr. Harris played 135 games as a wide

receiver for the Miami Dolphins from 1976 – 1983 and 1985 and the Cleveland Browns and Dallas Cowboys in 1984. He was a first team All-Conference and All-NFL selection in 1976.

34. Based on the information available to Mr. Harris – which is greatly limited because: (a) he does not know all of the Medications that Defendants provided him, and (b) the Defendants possess most, if not all, of the information related to dosage units, frequencies and durations of administrations and correlated, documented side effects – at this time, the injuries of which he is aware are damage to his internal organs, the muscular/skeletal injuries discussed above, and injury to his business or property. Mr. Harris did not become aware that Defendants caused those injuries until, at the earliest, March of 2014.

35. Plaintiff Jeffery Graham is a representative member of the putative class. As of the commencement of this action, he is a resident of Ohio. He played 163 games for the Pittsburgh Steelers from 1991 – 1993, the Chicago Bears from 1994 – 1995, the New York Jets from 1996 – 1997, the Philadelphia Eagles in 1998 and the San Diego Chargers from 1999 – 2001.

36. Based on the information available to Mr. Graham – which is greatly limited because: (a) he does not know all of the Medications that Defendants provided him, and (b) the Defendants possess most, if not all, of the information related to dosage units, frequencies and durations of administrations and correlated, documented side effects – at this time, the injuries of which he is aware are damage to his internal organs and the muscular/skeletal injuries discussed above. Mr. Graham did not become aware that Defendants caused those injuries until, at the earliest, March of 2014.

37. Plaintiff Cedric Killings is a representative member of the putative class. As of the commencement of this action, he is a resident of Florida. Mr. Killings played 34 games as a defensive tackle/special team player for the San Francisco 49ers in 2000; the Cleveland Browns and

Carolina Panthers in 2001; the Minnesota Vikings in 2002-2003; the Washington Redskins in 2004-2005 and the Houston Texans in 2006-2007.

38. Based on the information currently available to Mr. Killings – which is greatly limited because (a) he does not know all of the Medications that Defendants provided him, and (b) the Defendants possess most, if not all, of the information related to dosage units, frequencies and durations of administrations and correlated, documented side effects – at this time, the injuries of which he is aware are damage to internal organs and the muscular/skeletal injuries discussed above. Mr. Killings did not become aware that Defendants caused those injuries until, at the earliest, March of 2014.

39. Plaintiff Reggie Walker is a representative member of the putative class. As of the commencement of this action, he is a resident of Colorado. Mr. Walker played in 75 games as a linebacker for the Arizona Cardinals from 2009 – 2012 and for the San Diego Chargers from 2013 – 2014.

40. Based on the information currently available to Mr. Walker – which is greatly limited because (a) he does not know all of the Medications that Defendants provided him, and (b) the Defendants possess most, if not all, of the information related to dosage units, frequencies and durations of administrations and correlated, documented side effects – at this time, the injuries of which he is aware are the muscular/skeletal injuries discussed above.

II. DEFENDANTS COMPRISE THE NATIONAL FOOTBALL LEAGUE.

41. Defendant Arizona Cardinals Club, LLC, individually and as successor to the Phoenix Cardinals, St. Louis Cardinals, and Chicago Cardinals (collectively "Cardinals"), is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

42. Defendant Atlanta Falcons Football Club, LLC ("Falcons") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

43. Defendant Baltimore Ravens LP ("Ravens") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

44. Defendant Buffalo Bills, Inc. ("Bills") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

45. Defendant Panthers Football, LLC ("Panthers") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

46. Defendant The Chicago Bears Football Club, Inc. ("Bears") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

47. Defendant Cincinnati Bengals, Inc. ("Bengals") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

48. Defendant Cleveland Browns Football Club, LLC ("Browns") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

49. Defendant Dallas Cowboys Football Club, Ltd. ("Cowboys") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

50. Defendant PDB Sports, Ltd. ("Broncos") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

51. Defendant Detroit Lions, Inc. ("Lions") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

52. Defendant Green Bay Packers, Inc. ("Packers") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

53. Defendant Houston Holdings LP ("Texans") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

54. Defendant Indianapolis Colts, Inc., individually and as successor to the Baltimore Colts ("Colts"), is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

55. Defendant Jacksonville Jaguars, LLC ("Jaguars") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

56. Defendant Kansas City Chiefs Football Club, Inc. ("Chiefs") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

57. Defendant Miami Dolphins, Ltd. ("Dolphins") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

58. Defendant Minnesota Vikings Football Club, LLC ("Vikings") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

59. Defendant New England Patriots, LLC ("Patriots") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

60. Defendant New Orleans Saints, LLC ("Saints") is engaged in interstate commerce in the business of, among other things, promoting, operating and regulating the NFL.

61. Defendant New York Football Giants, Inc. ("Giants") is engaged in interstate commerce in the business of, among other things, promoting, operating and regulating the NFL.

62. Defendant New York Jets, LLC ("Jets") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

63. Defendant The Oakland Raiders, LLP, individually and as successor in interest to the Los Angeles Raiders ("Raiders"), is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL and is a resident of this district.

64. Defendant Philadelphia Eagles, LLC ("Eagles") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

65. Defendant Pittsburgh Steelers, LLC ("Steelers") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

66. Defendant The Los Angeles Rams, LLC, individually and as successor in interest to the St. Louis Rams ("Rams"), is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

67. Defendant Chargers Football Company, LLC ("Chargers") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

68. Defendant Forty Niners Football Company ("49ers") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL and is a resident of this district.

69. Defendant Football Northwest, LLC ("Seahawks") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

70. Defendant Buccaneers LP ("Buccaneers") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

71. Defendant Tennessee Football, Inc., individually and as successor in interest to the Houston Oilers ("Titans"), is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

72. Defendant Pro-Football, Inc. ("Redskins") is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the NFL.

INTRADISTRICT ASSIGNMENT

73. This matter has been assigned to the San Francisco Division.

FACTS COMMON TO ALL COUNTS

I. THE RELEVANT HISTORY OF THE RELATIONSHIP BETWEEN THE CLUB DEFENDANTS AND THEIR PLAYERS.

A. Labor Relations Between the Clubs and Players.

74. Clubs playing American professional football first organized themselves as a league in 1920, calling the organization the American Professional Football Association. The Clubs renamed the league the National Football League in 1923 and have conducted joint activities under that name until the present day.

75. From 1923 until 1968, players had no bargaining rights and were subject to unilateral rules imposed jointly by the Clubs. No collective bargaining agreement ("CBA") was in existence for the first 45 seasons of professional football. The National Football League Players Association ("NFLPA"), even though it had been in existence since 1956, was not recognized as a union or the sole and exclusive bargaining representative for the Clubs' players until 1968. The NFLPA negotiated the first CBA with the Clubs that year. A second CBA between the Clubs and players was signed in 1970.

76. The 1970 CBA expired after the 1973 season and no CBA was in existence for the 1973 – 1976 seasons. During that period, the NFLPA filed an antitrust suit against the NFL and the Clubs: *Mackey v NFL*, 543 F.2d 606 (8th Cir. 1976). In ruling for the players, the appeals court affirmed the District Court's holding that the restrictions on player movement contained in the 1968 and 1970 CBAs were not the product of *bona fide* arm's-length bargaining. The Eighth Circuit further noted that "in part due to its recent formation and inadequate finances, the NFLPA, at least prior to 1974, stood in a relatively weak bargaining position *vis-à-vis* the clubs." *Id.* at 615.

77. In 1977, after the *Mackey* decision, the Clubs and players resolved their legal differences in part through a new CBA, the first such agreement that was the product of good faith, *bona fide* arm's-length bargaining.

78. Upon the expiration of the 1977 CBA, the Clubs and players negotiated a new CBA in 1982 that expired after the 1986 season. No CBA was in existence for the 1987 – 1992 seasons. As part of the settlement of another antitrust lawsuit filed by the players, a new CBA was executed in 1993. From that date until present, every football season has been played pursuant to a CBA.

79. The football seasons from 1923 through 1967, 1973 through 1976 and 1987 through 1992 were not subject to any CBA. The seasons from 1968 through 1972 were subject to CBAs that were not the product of *bona fide*, arm's-length bargaining. Therefore, only the 1977 through the 1986 and 1993 through the 2016 seasons were governed by valid CBAs.

80. No CBA has addressed, let alone regulated, the administration or dispensation of Medications. In public filings, the NFLPA has endorsed the statement that "[n]o CBA provision addresses the NFL's responsibilities *vis a vis* the illicit provision of the Medications. Not one of the hundreds of NFL-selected pages of CBAs going back to 1968 mention[s] the Medications or protocols for their provision."

B. <u>The Clubs Mandated that Players Use Their Doctors and Trainers</u>.

81. Alvah Andrew "Doc" Young was a founder of the NFL and owned the Hammond Pros, an early Club. He was also the first professional football team doctor, serving from 1920 – 1926. On information and belief, the Clubs have provided doctors for their players continuously since the inception of the NFL.

82. The Clubs provided doctors and trainers for the 1923 through 1967, 1973 through 1976, and 1987 through 1992 seasons during which time no CBA was in effect. The Clubs provided doctors and trainers for the 1968 through 1972 seasons during which the CBAs in effect were not the product of *bona fide*, arm's-length bargaining. Since their inception, the Clubs have recognized that they maintain a hazardous workplace.

83. The NFL Physicians Society (the "Physicians Society") was founded in 1966 by a group of long-time Club doctors and exists today. Its mission is "to provide excellence in the medical and surgical care of the athletes in the NFL and to provide direction and support for the athletic trainers in charge of the care of these athletes." *See* http://nflps.org/ (last visited October 24, 2016). It has 134 members, including all physicians from all 32 Clubs.

84. Although one would think that teams truly competing against each other would want to maintain a propriety interest in their medical treatments, the opposite is the case with the NFL. For example, in 1985, the Clubs decided they would participate in future national invitational camps, commonly known as the Combine, and share costs for medical examinations of draft-eligible players. The Combine continues to this day and at each annual event, doctors from all 32 Clubs meet to discuss issues common to the member Clubs.

85. According to the Physicians Society, its goals are "to constantly work toward improving the care of the professional football players and prevention and treatment of injuries." *See* http://nflps.org/ (last visited October 24, 2016). Their stated purpose is to "manage injuries once they occur to allow players … highest level of potential." *Id.*

86. On information and belief, the Clubs have provided trainers continuously since the early years of the NFL. The NFL Athletic Trainers Society was founded in the mid-1960's by a number of long time Club trainers.[1] According to the PFATS web site, that group came together because it "saw an opportunity to share knowledge and techniques on injury prevention and rehabilitation at the National Athletic Trainers Association … Annual Meeting and Clinical Symposium." *See* http://www.pfats.com/about/history/ (last visited October 24, 2016).

[1] That organization was succeeded in 1982 by the Professional Football Athletic Trainers Society ("PFATS").

87. After the AFL-NFL merger, AFL trainers "began attending" that annual meeting as well and "team physicians soon followed." *Id.* "[In 1969], a league official began attending, and by the end of the decade, then-NFL commissioner Pete Rozelle required all teams to send their head athletic trainers to the annual NFL Athletic Trainers Meetings." *Id.*

88. According to PFATS, it was founded because NFL Clubs "are always trying to gain an edge. [Clubs] need to provide the best and most complete care for their product – the players." *Id.* Today, PFATS is in partnership with the Physicians Society and the NFL and states that its mission is to serve the players of the NFL.

II. THE CLUBS HAVE CREATED A RETURN TO PLAY PRACTICE OR POLICY THAT PERMEATES PROFESSIONAL FOOTBALL.

89. The Clubs have recognized the appeal of violence associated with football since the inception of the sport. But the Clubs have also recognized that, to give the public the best product possible, marquee players need to play, even if they are injured and in pain. One solution to this inherent conflict – violence sells but it also puts players on the sidelines who bring fans to the game – would be to play fewer games, give players more time to rest between games, and have larger rosters. But that would cut into the Clubs' profit margins.

90. Instead, the Clubs have resolved this inherent conflict in favor of profit over safety with more games, less rest (*e.g.*, Thursday night football), and smaller rosters that save payroll expenses. And they achieve their ends through a business plan in which every Club employee – general managers, coaches, doctors, trainers and players – has a financial interest in returning players to the game as soon as possible. Everyone's job and salary depend on this simple fact. The return to play practice or policy was based on four cornerstone concepts: profit, media, non-guaranteed contracts, and drugs. As professional football took off, these bedrock concepts would become the driving force behind every business decision made by the Clubs.

91. While professional football has been a popular spectator sport since its inception, with the widespread availability of television in the 1960's, the Clubs realized that the opportunity for profits would greatly increase as income would no longer be dependent solely on attendance at the games. As the television networks began competing for the rights to televise games, the Clubs sought to further capitalize on the public's demand for the violence of the sport. But the ever-escalating profitability of the Clubs was dependent on keeping the players on the field, even when games and practices spawned increasing numbers of injuries as the result of bigger, stronger players having less time between games to recover. The health interests of the players were increasingly subordinated and forgotten as the Clubs evolved into multi-billion dollar businesses.

92. The Clubs also manipulated the media to increase revenue and reinforce the return to play practice or policy. In 1965, the Clubs created NFL Films to market video of the Clubs' games, coaches, and players. NFL Films highlighted the violence of the game and the "toughness" of its players. Dramatic collisions between players were highlighted in slow motion. Players who returned to the game with severe injuries were lauded as courageous heroes. These same themes were repeated by the broadcast networks. American folklore regarding professional football players was indelibly established – the players were super human warriors who played through pain for the integrity of the game they loved. The return to play practice or policy became an accepted fact of doing business by the Clubs as profits soared.

93. One need only examine the 1987 season to understand the importance of keeping the best players out on the field at all costs. That year, the players went on strike and the Clubs played a number of regular season games with so-called "replacement players." Television ratings for these games dropped by more than 20%. The networks agreed to continue broadcasting them only when the Clubs agreed to reduce prices to enable the networks to recoup the losses. The Clubs never used

replacement players again. On information and belief, this experience reinforced to the Clubs the importance of having "star" NFL players on the field.

A. Increasing Revenue Fuels the Return to Play Practice/Policy.

94. Between 1990 and 2013, Defendants' total annual revenue jumped from $1.5 billion to over $9 billion. Defendants' commissioner, Roger Goodell, has set a target of $27 billion by 2027.

95. In its thirst for constantly-growing revenue, Defendants expanded from 24 to 32 Clubs, added two more regular season games (and are looking to add two more), expanded the number of Clubs participating in post-season play, and scheduled more games during the week (particularly on Thursday nights), leaving players with less recovery time and greater chances for new injuries or worsening of existing injuries.

96. Indeed, professional football is such an omnipresent force, with off-season camps starting in April, the draft in May, practices and pre-season games through August, the regular season through December, and post-season often carrying over into February, that an entire TV channel, the NFL Network, devotes all day, every day to the game.

97. During this same time, players have gotten bigger and stronger. Mel Kiper, one of ESPN's senior football analysts, noted that in 2011, offensive lineman were on average 24 percent heavier than they were in 1979 and an average of 31 percent stronger than they were in 1991. In the 1960s, the Colts' Hall of Fame defensive tackle Art Donovan was considered a giant at 263 pounds. In recent years, the NFL has seen the likes of Aaron Gibson at 440 pounds, Albert Haynsworth and Shaun Rogers at 350 pounds, and King Dunlap, who stands 6 feet 9 inches and weighs 330 pounds.

98. More games, longer seasons, shorter recovery between games, plus bigger and stronger players, equals more frequent and debilitating injuries. These injuries pose a serious

business problem for Defendants, which need star players on the field any given Sunday – and Monday and Thursday – so the money can keep rolling in.

99. In a survey by the Washington Post, nearly nine out of 10 former players reported playing while hurt. Fifty-six percent said they did this "frequently." An overwhelming number – 68 percent – said they did not feel like they had a choice as to whether to play injured.

100. Those players are right – Defendants gave them no choice. From the beginnings of professional football to the present day, the Clubs have created a coercive economic environment in which all players have non-guaranteed contracts. The current standard player contract states that the player's salary is game to game and a player's contract can be terminated for lack of skill at any time (referred to as being "cut"). Players are constantly reminded by general managers, coaches and the media of the competitive nature of the game and the importance of playing. If a player is injured, coaches advise him to return to play as soon as possible to prevent a replacement from taking his spot on a Club. Rookie players are immediately told of the decades' long adage promulgated by the Clubs – "You can't make the Club in the tub." The Clubs exert enormous economic pressure on the players to return to play as soon as possible and play through the pain. This financial reality is reinforced by the Club-created image of the professional football player as heroic warrior.

101. From the outset, the means by which the Clubs facilitated the return to play practice or policy was the widespread availability of the Medications. Club doctors and trainers have distributed these controlled substances and prescription medications with little to no regard for the law or the players' health. Club doctors and trainers know that, if players are given adequate rest and do not return to the game, the doctor or trainer will be replaced. As the position of Club doctor and trainer have become increasingly lucrative, the pressures on the medical personnel to return players to the field have only increased. The Clubs have established a business culture in which

everyone's financial interest depends on doctors and trainers supplying Medications to players to keep them in the game.

102. That culture has so permeated the NFL that today, it is almost unshakeable. Although there are too many incidents of such behavior to list, two highly publicized, recent incidents make the point. In a 2013 playoff game, Washington Redskins quarterback Robert Griffin III re-injured his knee severely in the first quarter but still returned to the game despite a clear inability to run or even walk normally. He tore a ligament in his knee during the fourth quarter and was finally removed from the game. And in a game against the Washington Redskins on October 27, 2014, Dallas Cowboys' quarterback Tony Romo experienced a hard tackle that resulted in two vertebrae in his back being chipped and fractured. Romo returned to the game after taking a painkilling injection. He then missed the next week's game. Such injuries take six to eight weeks to heal. However, less than two weeks after the injury, the Cowboys were playing a game in London, an important showpiece for the Clubs trying to increase football's international popularity. Cowboys' owner Jerry Jones stated "[Romo's] going on the trip to London and logic tells you that we wouldn't have him make that trip to London and back if we didn't think he was going to play." Romo played in the game in London and the rest of the games the Cowboys played that year. On information and belief, Romo would have been unable to play through such acute pain without frequent use of painkilling pills and injections.

103. The Clubs maintain the return to play practice or policy by ensuring that players are not told of the health risks associated with taking Medications. Players are not informed of the long-term health effects of taking controlled substances and prescription medications in the amounts given to them by the Clubs. Players are not counseled that inadequate rest will result in permanent harm to joints and muscles. Players are frequently not told the name of the Medication they are being given.

Players are only told that, by taking the Medications offered by the Clubs, they will be able to continue playing or return to play sooner.

B. Manifestations of the Return to Play Practice or Policy.

104. People trust doctors. Patients intuitively believe that doctors – who are bound by the Hippocratic Oath to put patient interests first – and other medical personnel prioritize the patient's best interests and would not intentionally advise a procedure or prescribe or distribute a medication that would injure their health. Professional football players are no different.

1. The Clubs Affirmatively Misrepresent, or Provide False or Misleading Statements to their Players Regarding, the Reasons for Providing Medications and the Scope of Players' Injuries.

105. The Clubs have uniformly represented that they provide players with the best health care available. The Clubs also insist that their medical professionals prioritize the players' health. For example, in response to a lawsuit, Dr. Michael Matava, President of the Physicians Society and the Rams' doctor, stated in May of 2014 that "[a]s an NFL team doctor for the past 14 years, I have seen firsthand the outstanding medical care that team doctors provide to players on and off the field. I will leave it to others to respond to the specific allegations of the lawsuit, but as doctors we put our players first."

106. This representation, like all of the misrepresentations or false or misleading statements that Club doctors and trainers make about the quality of health care they provide to players, flies in the face of what actually happens on and off the field.

107. Such intentional misrepresentations also manifest in the form of responses to questions that players ask about the side effects of taking controlled substances or prescribed medications. The most frequent responses are "none," "don't worry about them," "not much," "they are good for you" or, in the case of injections, "maybe some bruising," all of which misrepresent the

actual health dangers posed by these drugs, including the kidneys' inability to process the vast quantities ingested.

108. Doctors and trainers also misrepresent the extent of a player's injury to get him to return to play sooner. Players report that doctors and trainers refer to everything as a "sprain" to convince the player that the injury is not serious and the player can play through it. The player may not find out that the "sprain" is a break or tear until years later.

2. Omissions Constitute Intentional Misrepresentations.

109. Club doctors and trainers do not inform players of the risks posed by the use of Medications, especially in the volume players are instructed to consume. Given the trust placed in the doctors and trainers by players and the affirmative misrepresentations noted above, failure to provide a player with a legally-required warning about a drug's side effects constitutes an actionable omission that renders the statement misleading or false.

110. Club doctors and trainers do not inform players that they are distributing Medications in an amount, dosage and manner they know is illegal. Doctors and trainers provide Medications to professional football players in amounts and distribution procedures they would never do in their regular practice with non-football player patients. Failure to inform players of known illegalities constitutes an intentional misrepresentation that the practices are, in fact, legal.

111. Club doctors and trainers do not inform players of the health risks associated with mixing Medications in the volume and manner they are doing (referred to as "cocktailing"). These dangers are increased when the doctors and trainers know the Medications are often being mixed with Club-provided alcohol. Failure to inform players of the known dangers from mixing the Medications being distributed by the Club to them constitutes an intentional misrepresentation.

112. Club doctors and trainers do not inform players of the names of the Medications they are being given and often these Medications are provided without a prescription, legally referred to

as misbranding. Players and trainers frequently tell players to simply "take this" and they will feel better. Players frequently report that they were never told all of the drugs they were being given. Failure to disclose the name of a controlled substance or prescribed medication to a player constitutes an intentional misrepresentation.

113. Club doctors and trainers frequently fail to document properly in a player's medical records the usage of Medications. In a review of the medical records of 745 former players provided by the Clubs for purposes of Workmen's Compensation claims, 164 (22%) players had no records at all, 196 (26.3%) did not mention any drugs at all, 64 (8.6%) mentioned drugs without dosages, and 321 (43%) mentioned only some dosages. These failures highlight the omissions that occur as doctors and trainers fail to document the Medications they are providing the players.

114. Examples of these omissions include the following:

- While playing with the Los Angeles/St. Louis Rams, Jim Anderson and other trainers whose names Mr. Ashmore cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to Darvocet, Percocet, Celebrex, and sleeping pills, to Mr. Ashmore and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing with the Washington Redskins, Bubba Tyler and other trainers, whose names Mr. Ashmore cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to painkillers and muscle relaxers in capsule or tablet form, to Mr. Ashmore and failed to: provide a prescription; identify the medication by its established name; provide adequate

directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.

- While playing with the Oakland Raiders, Rod Martin and Scott Touchet administered pain-numbing and anti-inflammatory medications, including but not limited to Vioxx, Darvocet, Percocet, and sleeping pills, to Mr. Ashmore and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing with the Indianapolis Colts, Edward "Hunter" Smith, Dave Hammer, and other trainers whose names Mr. Goode cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to Naproxen, Tylenol-Codeine #3, Vicodin (hydrocodone), Indocin (indomethacin), Percocet (oxycodone), and unknown pain numbing injections to Mr. Goode and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing with the Green Bay Packers, Dominic Gentile, James Popp, and other trainers whose names Mr. Carreker cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to Tylenol Codeine #3, Percocet (oxycodone), Vicodin (hydrocodone), Motrin 800 (ibuprofen) and muscle relaxants, to Mr. Carreker and failed to: provide a prescription; identify

the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.

- While playing with the Denver Broncos, Steve Antonopulos, Jim Gillen, James Collins, and other trainers whose names Mr. Carreker cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to Tylenol-Codeine #3, Percocet (oxycodone), Vicodin (hydrocodone), and Motrin 800 (ibuprofen), to Mr. Carreker and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing with the Miami Dolphins, Bob Lundy, Junior Wade, and other trainers whose names Mr. Harris cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to Tylenol-Codeine #3, Darvon (propoxyphene) and unknown pain numbing injections, to Mr. Harris. He also regularly received caffeine pills and other stimulants. When these medications were provided to Mr. Harris, Dolphins personnel failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.

- While playing with the Cleveland Browns, team trainers whose names Mr. Harris cannot recall at this time administered various pain-numbing and anti-inflammatory medications, including but not limited to Tylenol-Codeine #3, to Mr. Harris as well as medication intended to control his irregular heartbeat. When these medications were provided to Mr. Harris, Browns personnel failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing with the Dallas Cowboys, Don Cochran, Ken Locker, and other trainers whose names Mr. Harris cannot recall at this time administered various pain-numbing and anti-inflammatory medications, including but not limited to Tylenol-Codeine #3, to Mr. Harris. When these medications were provided to Mr. Harris, Cowboys personnel failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing with the Phoenix Cardinals, John Omohundro, Jeffrey Herndon, and Jim Shearer administered pain-numbing and anti-inflammatory Medications, including but not limited to Tramadol, Naproxen and muscle relaxants, to Mr. Lofton and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.

- While playing for the Carolina Panthers, John Kasik and other trainers whose names Mr. Lofton cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to Tramadol, Naproxen, muscle relaxants, and unknown pain numbing injections. When these Medications were provided to Mr. Lofton, Panthers personnel failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing with the New England Patriots, team trainers whose names Mr. Lofton cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to Tramadol, Naproxen, muscle relaxants to Mr. Lofton and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing with the Seattle Seahawks, Sam Ramsden, Ken Smith, and Donald Rich administered pain-numbing and anti-inflammatory medications, including but not limited to Tylenol-Codeine #3, Percocet (oxycodone), Vicodin (hydrocodone), Toradol, Indocin, and Prednisone to Mr. Wunsch and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.

- While playing with the Tampa Bay Buccaneers, Todd Torcelli and Jim Whalen administered pain-numbing and anti-inflammatory medications, including but not limited to Tylenol-Codeine #3, Percocet (oxycodone), Vicodin (hydrocodone), Indocin, Vioxx, and muscle relaxers to Mr. Wunsch and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing with the San Francisco 49ers, head trainer Lindsey McLean and assistant trainers, the names of whom Mr. Killings cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to Percocet, Vicodin, Toradol, and/or muscle relaxers, to Mr. Killings and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing with the Minnesota Vikings, trainers, the names of whom Mr. Killings cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to Percocet, and Vicodin, to Mr. Killings and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.

- While playing with the Buffalo Bills, the head trainer, the name of whom Mr. King cannot recall at this time, and assistant trainer Shone Gipson administered pain-numbing and anti-inflammatory medications, including but not limited to Percocet (oxycodone), Toradol, and muscle relaxants, to Mr. King and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing with the Tennessee Titans, head trainer Brad Brown and other trainers, the names of whom Mr. King cannot recall at this time, administered pain-numbing and anti-inflammatory medications, including but not limited to Percocet (oxycodone), Toradol, and Vicodin, to Mr. King and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing with the Detroit Lions, Dean Kleinschmidt and Al Bellamy administered pain-numbing and anti-inflammatory medications, including but not limited to Percocet (oxycodone), Toradol, and Vicodin, to Mr. King and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.

- While playing with the New Orleans Saints, head trainer Dean Kleinschmidt and assistant trainer Kevin Mangum, as well as other trainers, the names of whom Mr. Massey cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to Oxycodone, Keflex, and Toradol, to Mr. Massey and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing with the Phoenix Cardinals, trainers Jim Shearer and Jeff Herndon, as well as other trainers, the names of whom Mr. Massey cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to Vicodin, Indocin, and Toradol, to Mr. Massey and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing with the Detroit Lions, head trainer Kent Folb and assistant trainer Joe Recknagel, as well as other trainers, the names of whom Mr. Massey cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to Vicodin, Hydrocodone, Indocin, Feldene and Toradol, to Mr. Massey and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.

- While playing with the Jacksonville Jaguars, head trainer Mike Ryan, as well as other trainers, the names of whom Mr. Massey cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to Indocin, Vicodin, and Toradol, to Mr. Massey and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing with the New York Giants, head trainer Ronnie Barnes and assistant trainer Byron Hanson, as well as other trainers, the names of whom Mr. Massey cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to Indocin, to Mr. Massey and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing with the Arizona Cardinals, trainers whose names he cannot remember administered pain-numbing and anti-inflammatory medications, including but not limited to Toradol, to Mr. Walker and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing with the San Diego Chargers, trainers whose names he cannot remember administered pain-numbing and anti-inflammatory medications, including

but not limited to Toradol, to Mr. Walker and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.

- While playing with the Minnesota Vikings, trainers whose names cannot be recalled at this time administered pain-numbing and anti-inflammatory medications, including but not limited to Vicodin, Percocet, Motrin and Toradol injections, to Mr. Evans and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing for the Pittsburgh Steelers, John Norwig, Ralph Berlin, and other trainers whose names Mr. Graham cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to Naproxen, Vicodin, Indocin, Medrol, Celebrex, Darvocet, Tylenol-Codeine #3, and Erythromycin. When these Medications were provided to Mr. Graham, Steelers personnel failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.
- While playing for the Cincinnati Bengals, Paul Sparling, Robert Recker, and other trainers whose names Mr. Sadowski cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to Tylenol-

Codeine #3, muscle relaxants, and injections of Cortisone and/or Toradol. When these Medications were provided to Mr. Sadowski, Bengals personnel failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.

3. The Clubs Engage in Concerted Activity to Keep Players on the Field, Regardless of the Cost.

115. The Clubs have conspired to put profit over player safety since at least the 1960s.

116. As an initial matter, the Clubs have had ample opportunity to share information about revenue and how best to achieve high profit levels. The NFL executive committee has a member from each Club and they meet on an annual basis at a minimum. Moreover, general managers for the Clubs meet on a regular basis and the Clubs come together at other functions during the year, including the yearly Combine. And as described herein, the trainers are mandated to meet on at least a yearly basis while the doctors meet at least annually at the Combine. These regular meetings, which have been taking place for decades, provide the Clubs with the chance to share information to which the public is not privy.

117. From a structural perspective, it is not difficult for the Clubs to collude. There are high barriers to entry in the League, which has no competition in the world and serious economic incentives to maintain the *status quo*. The limited number of Clubs – there are only 32 – is exactly the sort of highly-concentrated market that fosters the creation, and permits the maintenance, of illicit agreements like those detailed herein. It is (obviously) against one's self-interest to violate federal drug laws unless you know that everyone else is doing so and they all have the same reason not to reveal what the others are doing. Put another way, the usual incentives – increased market share and revenue – are not there for one Club to flip on the others because if they do so, the whole

structure will come crashing down and all of them will pay the price. Accordingly, even with the movement of players from Club to Club, the Clubs know that so long as they present a united front, they face little chance of detection.

118. But simply because one has the means does not necessarily mean they have the motive to collude. The Clubs have ample reason to do so. As detailed herein, the NFL juggernaut has exploded in terms of revenue and it intends to get even bigger. The Clubs share the same economic interest in keeping each other's stars on the field and playing more games to keep TV revenues high, along with jersey sales and all the other means by which the Clubs profit off their players, while at the same time keeping rosters small and overhead low. Indeed, the revenue-sharing that takes place among the Clubs – they all share equally from their TV deal – means they have little if any interest in maximizing their own profit at the expense of competitors and, to the contrary, will protect each other in mutually-advancing their interests.

119. And as detailed herein, the Clubs decided to keep their players on the field, and the profits high, by feeding drugs to their players in dangerous quantities and the manner in which they have done so shows brazen disregard for federal and state drugs laws. The ubiquity of their illegal conduct, which comes in several forms and has been ongoing for decades, negates any inference that the Clubs have been acting independently. Such conduct includes in particular the manner in which the Clubs have distributed Medications to players, who have consistently reported that since the mid-1960s, Medications have been distributed as if they were candy. The Medications have changed, but decade to decade, the players report a similarity in the manner in which they are distributed by the Clubs: Quaaludes and amphetamines beginning in the mid-1960's, Vioxx and OxyContin beginning in the 1970's, Percocet and Indocin in the 1980's and, beginning in the 1990's, Toradol.

120. The introduction of Toradol by all the Clubs elevated the return to play practice or policy to new heights. From the mid-1990's until the present day, the Clubs have given Toradol to

players as both a painkiller and a prophylactic. Players from multiple Clubs report lines of 30 – 35 players lined up for Toradol shots before games. Indeed, Hall of Fame Coach and media analyst John Madden, commenting on the widespread availability of Toradol, noted "I know an announcer that goes down to the locker room to get a Toradol shot before a game." In the last few seasons, the Clubs have reduced the number of injections and increased the usage of Toradol pills. The Clubs use Toradol for practice but its extensive use is reserved primarily for games. As the Clubs have scheduled more mid-week games, Toradol has become an even more important component of the return to play practice or policy. The Clubs continue to use other painkillers and anti-inflammatories during the practice week.

121. The Clubs imposed a uniform Toradol waiver beginning with the 2010 season, a sample copy of which is attached hereto as **Exhibit A**. Every player on each Club was asked to sign the waiver, which is identical for each Club.

122. Since the mid-1960's, the Clubs have provided players with sleep aids. Ambien, a controlled substance, has been the drug of choice for multiple decades.

123. Since doctors are only present with the players on home game days, away game weekends and one (occasionally a second) day during the week, trainers and their assistants had to be folded into the loop of distributing Medications. Players from at least the 1960's to the present consistently state that trainers routinely gave them Medications without examination, diagnosis, or warnings – all outside the presence of a licensed physician.

124. As public awareness of the prevalence of drugs has increased, the Clubs have jointly imposed a number of mandated procedures to control the drug distribution system while keeping the flow as high as possible. The Clubs required that all drugs be locked in a closet or similar locked storage facility. The Clubs also required that Club doctors register the Clubs' facility as a storage facility for controlled substances and prescription medication. The Clubs finally looked into the

possibility that they would purchase and utilize tracking software created by a firm called SportPharm. SportPharm collects the data and retains it in the event the Clubs are questioned about their drug distribution by the Drug Enforcement Agency ("DEA") or an appropriate state agency.

125. On information and belief, the Clubs created a committee – the NFL Prescription Drug Advisory Committee – to oversee the administration of controlled substances and prescription drugs to players in all the Clubs. The person in charge of the committee is Dr. Lawrence Brown and the committee, at least as of November 6, 2014, was comprised of the following persons who were attending its meetings: Lawrence Brown, MD; Charles Brown, MD; Louis Baxter, MD; Arun Ramappa, MD; Bertha Madras, PhD; Linda Cottler, PhD; Seddon Savage, MD; Bryan Finkle, PhD; J. Michael Walsh, PhD; Jeff Miller, NFL V.P. for Security who resigned in May 2016 from that position; Lawrence Ferazani, NFL Senior V.P. for Labor Litigation & Policy; Amy Jorgensen, Director, Health and Safety Policy for the NFL; Nicolette Dy, project coordinator for player health and safety issues for the NFL; Lanisha Frazier-Conerson, NFL Program Administrator for Substances of Abuse; Brandon Etheridge, General Counsel for the Baltimore Ravens who as of November 2014 was counsel to the NFL; Elliott Pellman, MD, former team doctor for the New York Jets and medical advisor to the NFL; Christina Mack; Adolpho Birch, NFL Senior V.P. of Labor Policy & League Affairs; and Matt Matava, MD, former team doctor to the St. Louis Rams. The committee meets at least twice a year at the Combine and at the summer League meetings.

126. The Clubs also exert control over, and constant monitoring of, the storage and administration of controlled substances and prescription drugs through their agent, the NFL Security Office. Security Office personnel regularly meet and consult with Club officials, including doctors and trainers, and conduct regular audits of Club record keeping and facilities.

127. In the fifty one football seasons played from 1964 to 2014, every Club has had a doctor and trainer distribute controlled substances and prescription medication to players in a manner

that violates federal and state law. Therefore, hundreds of doctors and trainers are treating their professional football patients differently from any other patient they treat, have treated or will treat. The only plausible explanation for this uniform, systematic, decades-long practice is that every Club is following an agreed-upon program of mandating that their doctors and trainers distribute drugs to get players back on the field at all costs.

C. Defendants' Actions Violate Federal Drug Laws.

128. United States law regulates the dispensation of certain medications that carry a greatly-enhanced risk of abuse ("controlled substances") and other medications too dangerous to be sold over the counter ("prescription medications"). Federal law also criminalizes violations of such regulations. This regulatory regime protects against the dangers of abuse inherent in the use of controlled substances such as opioids and other powerful prescription painkillers and applies to anyone involved in the dispensation of these substances, from a physician operating a solo medical practice to a multibillion-dollar machine such as professional football.

1. The Controlled Substances Act Criminalizes the Dispensation and Possession of Medications that the Clubs Routinely Give Players.

129. In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act (the "Act"). Title II of this Act, codified as 21 U.S.C. § 801, *et seq.*, is known as the Controlled Substances Act or the "CSA."

130. Regulation and enforcement of the CSA is delegated to the Food and Drug Administration ("FDA"), the DEA, and the Federal Bureau of Investigation ("FBI").

131. The CSA[2] organizes controlled substances into five categories, or schedules, that the DEA and FDA publish annually and update on an as-needed basis. The controlled substances in

[2] Medications regulated by the CSA also constitute prescription medications under the Food, Drug and Cosmetic Act, thereby requiring a prescription before they can be dispensed.

each schedule are grouped according to accepted medical use, potential risk for abuse, and psychological/physical effects.

132. Under authority provided by the CSA at 21 U.S.C. § 821, the United States Attorney General can promulgate (and has promulgated) regulations implementing the CSA.

a. The CSA's Regulatory Regime.

133. The CSA contains a number of provisions governing the dispensation,[3] use, distribution, and possession of controlled substances. Under the CSA, "[e]very person who manufactures or distributes any controlled substance[,]" or "who proposes to engage in the manufacture or distribution of any controlled substance[,] … [or] who dispenses, or who proposes to dispense, any controlled substance," shall obtain from the Attorney General a registration "issued in accordance with the rules and regulations promulgated by [the Attorney General]." *Id*. at § 822(a)(1)-(2).

134. To distribute Schedule II or III controlled substances, applicants must establish that they: (a) maintain "effective control[s] against diversion of particular controlled substances into other than legitimate medical, scientific, and industrial channels;" (b) comply "with applicable State and local law;" and (c) satisfy other public health and safety considerations, including past experience and the presence of any prior convictions related to the manufacture, distribution, or dispensation of controlled substances. *Id.* at § 823(b).

135. The CSA mandates that controlled substances may be legally dispensed only by a practitioner or pursuant to a practitioner's prescription (as similarly established by 21 U.S.C. § 353(b)(1)) and within the purview of the practitioner's registered location. *Id.* at § 829.

[3] The CSA defines the dispensation of a controlled substance as the delivery of a controlled substance "to an ultimate user … by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance[.]" 21 U.S.C. § 802(10).

136. Moreover, Schedule II substances cannot be re-filled, *see id.* at § 829(a), while Schedule III and IV substances cannot be re-filled more than six months after the initial dispensation or more than five times "unless renewed by the practitioner." 21 U.S.C. § 829(b). Relevant examples of Schedule II substances include OxyContin and Percocet. Morphine, Codeine and Opium are also Schedule II substances. Ambien is a Schedule IV controlled substance.

137. Only those prescriptions "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice" may be used to legally dispense a controlled substance under § 829(b). 21 C.F.R. § 1306.04(a) (2013).

138. The CSA also establishes specific recordkeeping requirements for those registered to dispense controlled substances scheduled thereunder. For example, except for practitioners prescribing controlled substances within the lawful course of their practices, the CSA requires the maintenance and availability of "a complete and accurate record of each substance manufactured, received, sold, delivered, or otherwise disposed[.]" 21 U.S.C. § 827(a)(3).

139. The CSA's recordkeeping regulations require a person registered and authorized to dispense controlled substances to maintain records regarding both the substances' prior manufacturing and the subsequent dispensing of the substance. Such records must include the name and amount of the substances distributed and dispensed, the date of acquisition and dispensing, certain information about the person from whom the substances were acquired and dispensed to, and the identity of any individual who dispensed or administered the substance on behalf of the dispenser. 21 C.F.R. § 1304(22)(c) (2013).

140. Beyond specific recordkeeping, all registrants "shall [also] provide effective controls and procedures to guard against theft and diversion of controlled substances." 21 C.F.R. § 1301.71(a) (2013). Depending on the schedule assigned to a particular controlled substance, such substances must be securely locked within a safe or cabinet or other approved enclosures or areas.

Id. at §§ .72(b) & .75(b) (2013). Any theft or significant loss of controlled substances must be reported to the DEA upon discovery of the theft or loss. *Id.* at § .74(c) (2013).

b. The CSA's Criminal Regime.

141. The CSA enacted a comprehensive criminal regime to penalize violations of its rules and regulations.

142. Specifically, Part D of the CSA proscribes a series of "Prohibited Acts" that run the gamut from trafficking of controlled substances to their unlawful possession.

143. For example, it is unlawful for any person to knowingly or intentionally "distribute, or dispense, or possess with intent to … distribute, or dispense, a controlled substance[]" in violation of the CSA. 21 U.S.C. § 841(a)(1).

144. Each and every single violation of this section that involves a "Schedule III" controlled substance is a Federal felony subject to a variety of penalties, including but not limited to a term of imprisonment of up to ten years (15 years if the violation results in death or serious bodily injury) and a fine of $500,000 if the violator is an individual to $2,500,000 if the violator is not an individual (for first offenses). *Id*. at § 841(b)(1)(E)(i). These penalties are doubled if the violator has a prior conviction for a felony drug offense. *Id*. at §841(b)(1)(E)(ii).

145. It is also unlawful for anyone with a CSA registration to:

- "distribute or dispense a controlled substance" without a prescription or in a fashion that exceeds that person's registered authority. *Id*. at § 842(a)(1)-(2);

- distribute a controlled substance in a commercial container that does not contain the appropriate identifying symbol or label, as provided under 21 U.S.C. § 321(k), or to "remove, alter, or obliterate" such an identifying symbol or label. *Id*. at §§ 825, 842(a)(3)-(4); or

- "refuse or negligently fail to make, keep, or furnish any record, report, notification, declaration, order or order form, statement, invoice, or information required" under the CSA. *Id*. at § 842(a)(5).

A person who violates any of these provisions is subject to a minimum civil penalty up to $25,000. *Id.* at § 842(c)(1)(A).

146. It is also unlawful for a person "knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized" under the CSA. *Id*. at § 844(a).

147. A violation of this provision is subject to a term of imprisonment of up to one year and a fine of up to $1,000 for a first offense. *Id*. Multiple violations of this provision result in a term of imprisonment of up to three years and a fine of at least $5,000. *Id*.

148. Furthermore, "[a]ny person who attempts or conspires to commit any offense" described above "shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." *Id*. at § 846.

149. Except as authorized by the CSA, it is unlawful to "knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of distributing or using controlled substance" or to "manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance." *Id.* at § 856(a)(1) – (2). A violation of this section results in a term of imprisonment of up to 20 years and a fine of $500,000 if the violator is an individual or up to $2,000,000 if the violator is not an individual. *Id*. at § 856(b).

150. For decades, the Clubs' lack of appropriate prescriptions, failure to keep proper records, refusal to explain side effects, lack of individual patient evaluation, improper diagnosis and attention, dispensing of controlled substances outside of a practitioner's registered location, and use of trainers to distribute Schedule II and III controlled substances to its players, including Plaintiffs, individually and collectively violate the foregoing criminal and regulatory regime. In doing so, the Clubs not only left their former players injured, damaged and/or addicted, but also committed innumerable violations of the CSA.

2. **The Food, Drug, and Cosmetic Act Prohibits the Dispensation of Certain Medications Without a Prescription, Label, or Side Effects Warnings.**

151. A significant complement to the foregoing statutory regime is the Food, Drug, and Cosmetic Act (the "FDCA"). Enacted by Congress in 1938 to supplant the Pure Food and Drug Act of 1906, the FDCA prohibits the marketing or sale of medications in interstate commerce without prior approval from the FDA, the agency to which Congress has delegated regulatory and enforcement authority. *See* 21 U.S.C. § 331(d).

152. The FDCA has been regularly amended since its enactment. Most notably, changes in 1951 established the first comprehensive scheme governing the public sale of prescription pharmaceuticals as opposed to "over-the-counter" medications. The purpose of this regulatory regime was to ensure that the public was protected from abuses related to the sale of powerful prescription medications.

153. Pursuant to this amendment, the FDCA provides that if a covered drug has "toxicity or other potentiality for harmful effect" that makes its use unsafe unless "under the supervision of a practitioner licensed by law to administer such drug[,]" it can be dispensed only through a written prescription from "a practitioner licensed by law to administer such drug." 21 U.S.C. § 353(b)(1). Any oral prescription must be "reduced promptly to writing and filed by the pharmacist" and any

refill of such a prescription must similarly be authorized. *Id*. Failure to do so is frequently referred to as "misbranding." *Id.*

154. Jurisprudence interpreting the FDCA establishes that a proper "prescription" under the FDCA shall include directions for the preparation and administration of any medicine, remedy, or drug for an actual patient deemed to require such medicine, remedy, or drug following some sort of examination or consultation with a licensed doctor. Conversely, a "prescription" does not mean any mere scrap of paper signed by a doctor for medications.

155. As a result, a key element in determining whether or not § 353(b)(1) has been violated is the existence (or non-existence) of a doctor-patient relationship from which the "prescription" was issued.

156. The FDCA further provides that the prescribing medical professional shall be the patient's primary contact and information source on such prescription medications and their effects. *Id*. at §§ 352, 353. As such, regulations promulgated by the FDA require medical professionals to provide warnings to patients about such effects.

157. Dispensers violate the FDCA if they knowingly and in bad faith dispense medications without a prescription or with the intent to mislead or defraud. 21 U.S.C. §§ 331(a).

158. Dispensing a drug without a prescription, as the Clubs' doctors and trainers regularly did and do, results in the drug being considered "misbranded" while it is held for sale. *Id.* at § 353(b)(1). The FDCA prohibits: (a) introducing, or delivering for introduction, a misbranded drug into interstate commerce; (b) misbranding a drug already in interstate commerce; or (c) receiving a misbranded drug "in interstate commerce, or the delivery or proffered delivery thereof for pay or otherwise[.]" 21 U.S.C. §§ 331(a) – (c).

159. It is also an FDCA violation to provide, as the Clubs' doctors and trainers routinely did and do, a prescription drug without the proper FDA-approved label. *Id.* at § 352; 21 C.F.R. §§

201.50 –201.57 (2013). Stringent regulations dictate specific information that must be provided on a prescription drug's labeling, the order in which such information is to be provided, and even specific "verbatim statements" that must be provided in certain circumstances, such as the reporting of "suspected adverse reactions." *See generally* 21 C.F.R. §§ 201.56, .57, .80 (2013).

160. For instance, labeling for any covered medication approved by the FDA prior to June 30, 2001 must include information regarding its description, clinical pharmacology, indications and usage, contraindications, warnings, precautions, adverse reactions, drug abuse and dependence, overdosage, dosage and administration, and how it was supplied, to be labeled in this specific order. *See* 21 C.F.R. § 201.56(e)(1) (2013).

161. Such information must be provided under the foregoing headings in accordance with 21 C.F.R. §§ 201.80(a)-(k) (2013). For example, labeling regarding a covered drug's tendency for abuse and dependence "shall state the types of abuse [based primarily on human data and human experience] that can occur with the drug and the adverse reactions pertinent to them." *See id.* at § 201.80(h)(2) (2013).

162. Covered medications approved by the FDA after June 30, 2001 are subject to even more stringent labeling requirements. *See generally* 21 C.F.R. §§ 201.56(d)(1); .57(a) – (c) (2013). For instance, labeling for such covered drugs must provide: (a) if the covered drug is a controlled substance, the applicable schedule; (b) "the types of abuse that can occur with the drug and the adverse reactions pertinent to them[;]" and (c) the "characteristic effects resulting from both psychological and physical dependence that occur with the drug and must identify the quantity of the drug over a period of time that may lead to tolerance or dependence, or both." *See* 21 C.F.R. § 201.57(c)(10)(iii) (2013).

163. The Clubs' use of trainers to distribute medications, lack of appropriate prescriptions, failure to keep records, refusal to explain side effects, and lack of individual patient care, individually and collectively, violate the FDCA.

164. The FDCA expressly contemplates that the States will implement their own laws regulating controlled substances and prescription medications. All States do have such laws. Many States' laws are stricter than the FDCA.

D. Defendants' Actions/Omissions Run Afoul of Applicable Ethical Obligations.

165. The Code of Medical Ethics of the American Medical Association ("AMA") is frequently cited by Courts as persuasive evidence of the duties of medical practitioners. The United States Supreme Court has relied on the Code in reaching some of its most important decisions in the medical field. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) (citing the Code for holding that states have a legitimate interest in preventing physicians from assisting in suicide); *Vacco v. Quill*, 521 U.S. 793, 802 (1997) (same).

166. The Code itself is based on nine basic principles of medical ethics, such as that a physician "be honest in all professional interactions," AMA Code of Med. Ethics Principle II, "make relevant information available to patients," *id.* at V, and "regard responsibility to the patient as paramount." *Id.* at VIII.

167. From these simple premises are derived a number of related opinions of the AMA's Council on Medical Ethics, which "lay out specific duties and obligations for physicians." AMA Council on Med. Ethics, Op. 1.01.

168. For more than 30 years, the AMA has stood firm on the duties of physicians in the practice of sports medicine:

Physicians should assist athletes to make informed decisions about their participation in amateur and professional contact sports which entail the risks of bodily injury. The professional

responsibility of the physician who serves in a medical capacity at an athletic contest or sporting event is to protect the health and safety of the contestants. The desire of spectators, promoters of the event, or even the injured athlete that he or she not be removed from the contest should not be controlling. The physician's judgment should be governed only by medical considerations.

AMA Council on Med. Ethics, Op. 3.06.

169. Practitioners of sports medicine that work for a league or individual teams must also adhere to the duties described in Opinion 3.05, which governs physicians who are employed by a non-physician supervisee.

170. This situation creates the possibility that the physician's interests are "placed at odds with patient care interests." AMA Council on Med. Ethics, Op. 3.05.

171. However, the paramount duty of loyalty of physicians to their patients remains clear: to "give precedence to their ethical obligation to act in the patient's best interest by always exercising independent professional judgment, even if that puts the physician at odds with the employer/supervisee." *Id*.

172. A practitioner employed by an NFL team undoubtedly faces this inherent conflict of interest. Indeed, The Football Players Health Study at Harvard University just this month released a report titled "Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and Recommendations," available at https://footballplayershealth.harvard.edu/law-and-ethics-protecting-and-promoting/, and its first recommendation states "[t]he current arrangement in which club (i.e., "team") medical staff, including doctors, athletic trainers, and others, have responsibilities both to players and to the club presents an inherent conflict of interest."

173. However inherent this conflict of interest might be, it must be disclosed to the patient pursuant to AMA Council on Med. Ethics, Op. 10.01(1) ("Patients are entitled … to be advised of potential conflicts of interest that their physicians might have") but "[u]nder no circumstances may

physicians place their own financial interests above the welfare of their patients." AMA Council on Med. Ethics, Op. 8.03.

174. Relatedly, physicians are prohibited from doing what NFL doctors did, unnecessarily distributing medications to a patient to advance the physician's own financial interests. *Id.* This flows from three fundamental premises of medical ethics that apply regardless of any conflict of interest: (1) "[p]hysicians should not provide, prescribe, or seek compensation for medical services that they know are unnecessary[,]" AMA Council on Med. Ethics, Op. 2.19; (2) "[p]hysicians should prescribe medications, devices, and other treatments based solely upon medical considerations[,]" AMA Council on Med. Ethics, Op. 8.06, and (3) "[t]reatments which have no medical indication and offer no possible benefit to the patient should not be used[.]"

175. Dispensing medications that are not medically required – as NFL doctors and trainers systematically did – to make it more likely that a player will be able to participate in a game is therefore a breach of the duty to resolve all conflicts of interest "to the patient's benefit." AMA Council on Med. Ethics, Op. 8.03.

176. Though these medical ethics duties serve many goals, perhaps none is more paramount than obtaining a patient's informed consent.

177. First and foremost, in a rule the NFL doctors honored only in the breach, "[i]t is a fundamental … requirement that a physician should at all times deal honestly and openly with patients." AMA Council on Med. Ethics, Op. 8.12.

178. Further, as the AMA Council of Medical Ethics has observed:

> The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an informed choice. The patient should make his or her own determination about treatment. The physician's obligation is to present the medical facts

accurately to the patient … and make recommendations for management in accordance with good medical practice.

AMA Council on Med. Ethics, Op. 8.08; *see also* AMA Council on Med. Ethics, Op. 10.01(1) ("The patient has the right to receive information from physicians and to discuss the benefits, risks, and costs of appropriate treatment alternatives.").

179. This "duty of disclosure" based on Opinion 8.08 has been widely recognized in our nation's courts as "requiring that patients be given enough information to enable an intelligent choice." *See Marsingill v. O'Malley*, 58 P.3d 495, 504-505 (Alaska 2002); *Matthies v. Mastromonaco*, 733 A.2d 456, 463-464 (N.J. 1999).

180. Indeed, in many jurisdictions, the duty described in Opinion 8.08 supports a valid cause of action by a patient who has been harmed as a result of a lack of informed consent. *See, e.g., Acuna v. Turkish*, 930 A.2d 416, 425 (N.J. 2007).

181. In sum, "[w]ithholding medical information from patients without their knowledge or consent is … unacceptable." AMA Council on Med. Ethics, Op. 8.082.

182. NFL physicians' relationships with players are "based on trust and give[] rise to physicians' … obligations to place patients' welfare above their own self-interest ***and above obligations to other groups***," AMA Council on Med. Ethics, Op. 10.015 (emphasis added), such that patients should always expect to "receive guidance from their physicians as to the optimal course of action," AMA Council on Med. Ethics, Op. 10.01, determined by "sound medical judgment, holding the best interests of the patient as paramount," AMA Council on Med. Ethics, Op. 10.015.

183. In intentionally, recklessly, and negligently distributing powerful pharmaceuticals with the primary aim of bolstering the NFL's entertainment product and little concern for either the

short- or long-term effects on players, the physicians employed by the NFL and its teams have fallen far short of fulfilling the solemn duties this relationship entails.[4]

E. Defendants' Actions Have Long-Term Health Consequences for Players.

184. The constant pain that Plaintiffs and other players experience from their injuries while playing for the Clubs leads directly to a host of health problems.

185. Leading experts recognize that former professional football players who suffer from permanent musculoskeletal injuries often cannot exercise due to pain or other physical limitations, leading to a more sedentary lifestyle and higher rates of obesity.

186. According to the Centers for Disease Control and Prevention, obesity is linked to: coronary heart disease, type-2 diabetes, endometrial cancer, colon cancer, hypertension, dyslipidemia, liver disease, gallbladder disease, sleep apnea, respiratory problems and osteoarthritis.

187. Surveys of former NFL players confirm that they suffer from significantly higher rates of all these disorders when compared to the general population.

188. In addition, it is well-established that long-term use of opioids is directly correlated with respiratory problems and these problems are made worse by use of alcohol together with opioids.

189. Long-term opioid use has also been tied to increased rates of certain types of infections, narcotic bowel syndrome, decreased liver and kidney function and to potentially fatal inflammation of the heart. Opioid use coupled with acetaminophen use has been linked to hepatic (liver) failure.

190. Long-term use of opioids has also been linked directly to sleep disorders and significantly-decreased social, occupational and recreational function.

[4] Even if a physician has not violated any of the above duties, if the physician became aware of other practitioners that engaged "in fraud or deception" or other unethical conduct, the physician has a duty to report those individuals to the appropriate entities. AMA Code of Ethical Principles II; *see also* AMA Council on Med. Ethics, Op. 9.031.

191. Given the foregoing potential damage that opioids can inflict, nonsteroidal anti-inflammatory drugs ("NSAIDs") are often viewed as a safer alternative to narcotics.

192. Despite that popular notion, NSAIDs are associated with a host of adverse health consequences.

193. The two main adverse reactions associated with NSAIDs relate to their effect on the gastrointestinal ("GI") and renal systems. Medical studies have shown that high doses of prescription NSAIDs were associated with serious upper GI events, including bleeding and ulcers. Additionally, GI symptoms such as heartburn, nausea, diarrhea, and fecal blood loss are among the most common side effects of NSAIDs. Medical reports have also noted that 10-30% of prescription NSAID users develop dyspepsia, 30% endoscopic abnormalities, 1-3% symptomatic gastrouodenal ulcers, and 1-3% GI bleeding that requires hospitalization. Studies also indicate that the risk of GI side effects increases in a linear fashion with the daily dose and duration of use of NSAIDs.

194. NSAIDs are also associated with a relatively high incidence of adverse effects to the renal system. Medical journal articles note that "[p]rostaglandin inhibition by NSAIDs may result in sodium retention, hypertension, edema, and hyperkalemia." One study showed the risk of renal failure was significantly higher with use of either Toradol or other NSAIDs.

195. Patients at risk for adverse renal events should be carefully monitored when using NSAIDs. As the NFLPS Task Force stated, such patients include those with "congestive heart failure, renal disease, or hepatic disease[, and] also include patients with a decrease in actual or effective circulating blood volume (*e.g.*, dehydrated athletes with or without sickle cell trait), hypertensives, or patients on renin-angiotensis, aldosterone-system inhibitors (formerly ACE inhibitor) or other agents that affect potassium homeostasis" [*sic*].

196. Additionally, the anti-coagulatory effect of certain NSAIDs, including Toradol, can lead to an increased risk of hemorrhage and internal bleeding. The *Physician's Desk Reference*

specifically states that Toradol is "contraindicated as a prophylactic analgesic before any major surgery, and is contraindicated intra-operatively when hemostasis is critical because of the increased risk of bleeding."

197. Moreover, certain NSAIDs can adversely affect the cardiovascular system by increasing the risk of heart attack. Studies have shown that patients with a history of cardiac disease who use certain NSAIDs may increase their risk for heart failure up to ten times.

198. Finally, other systemic side effects associated with the use of NSAIDs include headaches, vasodilatation, asthma, weight gain related to fluid retention and increased risk for erectile dysfunction. Medical reports have also noted that "[i]ncreasing evidence suggests that regular use of NSAIDs may interfere with fracture healing" and that "[l]ong-term use of NSAIDs … has also been associated with accelerated progression of hip and knee osteoarthritis."

F. Defendants' Actions Have Negative Employment and Business Consequences for Players.

199. Professional football players have a limited window within which to maximize their earnings from the game. Indeed, there are only 50 or so persons who have played the game professionally into their 40s out of the tens of thousands of former players, and many of those persons who played that long were punters or kickers, who are less injury prone than other players. According to the NFL Players Association, the average career length is about 3.3 years.

200. Moreover, they achieve those earnings in a singular marketplace consisting on the one hand of individual players and the other, the Clubs.

201. The player entities need to stay as healthy as possible not only to earn as much as they can while they play but to best position themselves for later careers in coaching and/or broadcasting.

202. The Clubs, on the other hand, have a different incentive. Every year, the NCAA produces hundreds of new players just hoping for a chance to play professional football. As the

Clubs have a never-ending supply of players, they need not invest in their current players (unless they are making them money) because they know the players are replaceable.

203. It is thus no surprise that there are no guaranteed contracts and players are regularly cut. The pressure to make a Club and stay with it are well documented in articles like "Comfortably Numb: The NFL Fell in Love With a Painkiller It Barely Knew," in which Errict Rhett, a former NFL running back, is quoted as saying "The pressure on you to perform, that backup, they get in there man, and you might not ever see it … you might not ever get back in [the game] again, you know?"

204. Knowing that the players feel this pressure, and recognizing that they get the most bang for the buck when the best players are actually playing, the Clubs conspired to prevent their players from fully healing from their injuries, which would best allow the players to maximize their long-term output, by illegally supplying them with Medications and making associated misrepresentations or false or misleading statements and omissions associated therewith and as described herein.

205. Chris Goode, Duriel Harris, Charles Evans, Darryl Ashmore, Jerry Wunsch, Alphonso Carreker, and Steve Lofton, among others, were harmed in their business or property by such illegal actions in that their playing careers were unnecessarily shortened and their ability to earn thereafter was diminished and, for Carreker, completely extinguished.

206. The Clubs' violations of the foregoing players' legal entitlement to business relations unhampered by schemes prohibited by the predicate acts described herein serves in part as the basis for those players' RICO claims.

III. THE DEFENDANTS AND THE NFL HAVE RECOGNIZED THAT ITS DOCTORS/TRAINERS HAVE VIOLATED THE FOREGOING LAWS.

207. The Defendants and the League have recognized the problem of painkiller abuse for decades. In 1997, one General Manager said that painkiller abuse was "one of the biggest problems

facing the league right now." He said the League was trying to fix the problem, but described painkiller use among players as "the climate of the sport."

208. And while the NFL has acknowledged that "[t]he deaths of several NFL players have demonstrated the potentially tragic consequences of substance abuse," over the ensuing decade, little changed.

209. But a growing public disapproval of the NFL's lack of care for its players and treatment of them as disposable assets is finally forcing the League to acknowledge the looming crisis. A large part of the shifting sentiment stems from players' use of medications to fight injury and stay on the field at great cost to their future health and wellbeing. As described further below, the crisis is also fueled by coaches and executives. Moreover, recent medical studies have illuminated the grave health risks to which players are exposed through overuse of the weekday and game day prescription painkillers.

210. In 2012, Dr. Mathew Matava, team doctor for the St. Louis Rams and then president-elect of the Physicians Society, formed a task force to examine the use of Toradol and provide recommendations regarding the future use of the substance in the NFL. Matthew Matava *et al.*, "Recommendations of the National Football League Physician Society Task Force on the Use of Toradol Ketorolac in the National Football League," 4 *Sports Health* 5: 377-83 (2012) (hereinafter "Task Force Recommendations").

211. The task force recognized that a decade had passed since the only other study to look at Toradol in professional sports took place. JM Tokish, *et al.*, "Ketorolac Use in the National Football League: Prevalence, Efficacy, and Adverse Effects," *Phys Sportsmed* 30(9): 19-24 (2002) (hereinafter the "Tokish Study").

212. The Tokish Study sent questionnaires to the head team physician and the head athletic trainer of each of the NFL's 32 teams, with 30 of them responding. In addition to finding that 28 of

those 30 teams administered Toradol injections during the 2000 season, the Tokish Study also found the following:

- Of the 28 teams that used the drug, an average of 15 players were given injections (this answer ranged from 2 players to 35 players); and
- Twenty-six of the 28 teams used Toradol on game day.

213. One team had a policy of no use within 48 hours of games, and another team had a policy of no use within 12 hours of games.

214. Toradol has the potential for severe complications such as bleeding and renal damage. In fact, the two teams that did not use Toradol injections had strong policies against its use, citing potential complications, including renal failure and increased risk of bleeding.

215. Some players did experience Toradol complications; six teams reported at least one adverse outcome relating to Toradol use. Specifically, four teams noted muscle injury, one documented a case of gastrointestinal symptoms that resolved with cessation of Toradol use, and one reported that a player had increased generalized soreness one day after injection.

216. The Tokish Study concluded that "given that bleeding times are prolonged by 50% 4 hours after a single [shot of Toradol, use] on game day may deserve reconsideration in contact sports." The study then called for additional investigation and sought the development of standardized guidelines for Toradol use in athletes.

217. Over a decade later, the Matava task force determined that standardized guidelines still had not been implemented, and that Toradol use had increased in the NFL during the intervening period.

218. Therefore, the purpose of the task force was to "[p]rovide NFL physicians with therapeutic guidelines on the use of [Toradol] to decrease the potential risk of severe complications

associated with NSAIDs – in particular, the increased risk of hemorrhage resulting from a significant collision or trauma."

219. The task force recommended that:

- Toradol should not be administered prophylactically "prior to collision sports such as football, where the risk of internal hemorrhage may be serious" in light of the FDA's admonition "that [the drug] not be used as a prophylactic medication prior to major surgery or where significant bleeding may occur."
- Toradol should not be used "to reduce the anticipated pain, during, as well as after competition" because "[t]he perception of NFL players getting 'shot up' before competition has shed an unfavorable light on the NFL as well as on team physicians who are perceived as being complicit with the players' desire to play at all costs, irrespective of the medical consequences."
- If Toradol is to be administered, it should be given orally and not through the more aggressive injections/intramuscularly. The Task Force found that the greater risks associated with injections – infections, bleeding, and injury to adjacent structures – combined with quicker onset of the drug when taken orally "favors the oral route of administration."

220. Notwithstanding recommendations from the NFLPS that condemn many of the current practices regarding the administration of Toradol on game days, the Matava task force granted the NFL a reprieve given the "unique clinical challenges of the NFL," allowing that "each team physician is ultimately free to practice medicine as he or she feels is in the best interest of the patient."

221. Finally, despite the clear cut recommendations not to use Toradol prophylactically or intramuscularly, the task force gave itself an out by claiming that the medical literature is "deficient

in terms of the ethical considerations implicit with the administration of injectable medications in the athletic setting solely for the athlete to return to competition."

IV. PLAINTIFFS ARE REPRESENTATIVE MEMBERS OF THE PUTATIVE CLASS.

222. Each of the Clubs, through an agent or employee, made intentional misrepresentations of the kind documented herein to each of the named Plaintiffs. While it would be too burdensome to describe all of the misrepresentations herein, set forth below are some examples.

223. Etopia Evans remembers that, while her husband Charles Evans was playing for the Minnesota Vikings and Baltimore Ravens, he received hundreds of pills from trainers and injections from doctors of Medications. Mr. Evans specifically mentioned to her that he was receiving 800 milligram tablets of Vicodin and Percocet from Club trainers. Mr. Evans was also receiving what he referred to as "happy shots" (on information and belief, the drug Toradol) from Club doctors before games and at halftime. Mrs. Evans recalls her husband's evenings of pain on game nights when the effects of the "happy shots" began to wear off. He was never told of the side effects of any of these drugs. He never used Medications before signing his first contract. Mr. Evans' experience with these Medications was substantially similar with each Club for whom he played.

224. Mr. Evans was addicted to painkillers after his retirement from professional football. He became a person Mrs. Evans no longer recognized – constantly in pain and searching for relief. Eventually, Mrs. Evans and their child moved back to her home in Baton Rouge because daily life with Mr. Evans had become too difficult, thereafter seeing him on family vacations and frequent visits. In 2008, eight years after retiring from professional football, Mr. Evans died of heart failure due to an enlarged heart. His family had no history of heart problems and his parents were alive as of the filing of this action. Mr. Evans died alone in a jail cell – he had been incarcerated two days before his death for failure to pay support for a child from college. He had spent his money on painkillers instead.

225. While playing in the NFL, Robert Massey received hundreds of pills from trainers and injections from doctors of Medications. He does not remember all the drugs he was given by the trainers but he did receive Indocin, Percocet and Vicodin. The trainers would either hand him the pills or give them to him in brown envelopes. Club doctors gave Mr. Massey numerous injections of Toradol and Cortisone for both games and practices. Mr. Massey was never informed of the possible side effects of any of these drugs. He had seven different surgeries while playing. Mr. Massey never used painkillers, anti-inflammatories or sleep aids before he signed his first contract with a Club. His experience regarding these Medications was substantially similar with each Club for whom he played.

226. On September 4, 1994, the Detroit Lions were playing the Atlanta Falcons in the first game of the season. Mr. Massey had just signed his first large contract, coming to the Lions as a free agent. He hurt his right ankle early in the game and the Club doctor injected him with Toradol on the sideline while the game was being played. He finished playing the game.

227. After the game, he was lying on the training table as the ankle ballooned. Head Coach Wayne Fonts entered the training room, saw Mr. Massey and the swollen ankle and then said to him "Congratulations, you played a great game today. But you know we didn't pay you that kind of money to miss games." He didn't practice much during the next week because he couldn't run. The Lions' next game was away against the Minnesota Vikings on September 11, 1994. On the evening before the game, a trainer approached Mr. Massey, gave him some pills of Indocin and told him they would help his ankle. Two hours before the game, the Club doctor gave him a Toradol shot and the trainer wrapped his ankle extensively. Mr. Massey played the entire game and intercepted a pass. He played the remainder of the season with a swollen ankle.

228. Mr. Massey lives in constant pain. His shoulders, knees and ankles bother him on a daily basis. He is unable to exercise properly due to the pain and this has resulted in significant weight gain. Mr. Massey has not been able to go to a doctor in years because of the cost.

229. While playing in the NFL, Troy Sadowski received hundreds of pills from trainers and injections from doctors of Medications. During his time with each of his Clubs, pills were available from trainers and assistant trainers upon request. He was either handed the pills or received them in envelopes. He also received injections of Toradol and Cortisone from Club doctors. The Toradol injections were given prophylactically before every game. In Pittsburgh, syringes full of Toradol were lined up in the locker room labelled with the player's number. Mr. Sadowski was never told of the side effects of any of these drugs. In fact, he was told by a number of trainers that Toradol was not damaging to his long-term health. He never used a painkiller, anti-inflammatory or sleep aid before signing his first contract with a Club. Mr. Sadowski's experience with these Medications was substantially similar with each Club for whom he played.

230. Mr. Sadowski lives with constant pain in his back, hips, wrists, knees, ankles and shoulders. He still needs to take daily painkillers to get through the day and to sleep. He can no longer run and, when he walks, he feels as if his joints lack sufficient lubrication. He cannot lift his daughter nor have her sit on his lap without excruciating pain. His weight is increasing due to his inability to exercise. In December 2007, Mr. Sadowski was diagnosed with vocal cord cancer. He underwent seven weeks of intensive radiation therapy and is currently in remission. Mr. Sadowski has no family history of any vocal cord of esophageal problems

231. While playing in the NFL, Chris Goode received hundreds of pills from trainers and injections from doctors of Medications, all of which took place either on the sideline of a game/practice or in a locker room. He does not remember all the drugs he was given by the trainers but he did receive Tylenol-Codeine # 3 and Indocin. On many occasions, the trainers did not tell

him the names of the drugs he was being given. The trainers gave him the pills by hand or in small packages or clear bottles. Mr. Goode received Cortisone injections to alleviate specific pain from an injury, specifically when he hurt his knee, his ankle and when he was paralyzed on the field for 15 minutes. Following each of these injuries, the doctors gave him additional Cortisone shots for weeks. Mr. Goode was never informed of the possible side effects of any of these drugs. He never used painkillers, anti-inflammatories or sleep aids before signing his first contract with a Club.

232. Mr. Goode was diagnosed as having renal cancer in or around 2015. He underwent a partial nephrectomy in May 2015 to remove half of his kidney along with the malignant tumor growth. He is currently in remission but continues to experience pain on a daily basis resulting from this surgery. Mr. Goode has no family history of any kidney problems. He also suffers from numbness in his arms and legs and constant pain in his neck, back, elbows, wrists, feet, knee and ankle.

233. After suffering a neck injury in the 1993 season, Mr. Goode believes that the Colts were unwilling to re-sign him out of fear of his inability to play the following season. Moreover, he believes that other teams were told of his neck injury and that they were unwilling to sign him because of that reason too. Mr. Goode further believes that, had he been given time for his neck injury to heal, rather than being pressured to return to play, he would not have been in that position at the end of the 1993 season and would have been able to re-sign with the Colts or sign with another team. After not being re-signed by the Colts, Mr. Goode's endorsement agreement with Reebok was terminated.

234. While playing in the NFL, Darryl Ashmore received hundreds of pills from trainers and injections from doctors of Medications. Trainers visited his room the evening before away games dispensing these pills. The pills were frequently double the dosage of the same pills prescribed for him after his retirement. In many instances, Mr. Ashmore was never told the name of

the drug he was being given – he was simply told the pill would get him back on the field or help him sleep. Mr. Ashmore took Vioxx frequently, particularly while he was with the Raiders, along with sleeping aids. The Rams, including trainer Jim Anderson, frequently provided Celebrex, Percocet, Darvocet, and Vicodin, along with other pills whose names he cannot remember or which were never told to him.

235. Every Club on which he played provided these pills to him before games and practices. Pills were handed to him or given in envelopes. After the final game of the 2002 season, the Raiders gave him boxes of these pills to get him through the off season. He also received injections from doctors to alleviate pain and swelling from particular injuries. He was never advised of any side effects from these drugs. While in college, he received anti-inflammatories for a knee injury in 1989 but did not otherwise receive anti-inflammatories and he did not receive painkillers or sleep aids. Mr. Ashmore's experience with these Medications was substantially similar with each Club for which he played.

236. While with the Raiders, Mr. Ashmore believed he had broken his wrist at practice on or about October 25, 1998. Between that date and November 1, when the Raiders had an important Sunday night game against the Seattle Seahawks, he was told by the Club's doctor, Dr. Warren King, that the injury was only a sprain and that he would be fine with painkillers and anti-inflammatories. He played the Sunday night game without a cast and the next morning, Dr. King told him that his wrist was in fact broken and needed a cast. He played with a cast for the rest of the season and used painkillers and anti-inflammatories for the remainder of his career to numb the pain in his wrist. His wrist is now permanently damaged.

237. Also with the Raiders, Mr. Ashmore received multiple injections in his knee with a medication that he later learned should only be provided a maximum of two times during the entirety of a person's life.

238. While with the Redskins, Mr. Ashmore had a bad back injury that was treated with muscle relaxers and pain pills and he played three days after sustaining the injury. He has disc problems and advanced degeneration because of that injury.

239. While with the Rams, Mr. Ashmore was kept on the field, despite suffering from what he would later learn was a career-ending neck injury, through Medications and he was not told of their side effects. He ultimately herniated a disc in his neck, lost 70% of his strength in his right shoulder, and suffered from numbness and weeks of sleepless nights.

240. Mr. Ashmore is also in constant pain in his shoulders and knees. He has also been told that his kidneys may be damaged because a blood test revealed that his kidneys were leaking protein. His life insurance company raised his premiums due to the elevated serum creatinine levels in his body. He has no family history of kidney problems.

241. While playing in the NFL, Alphonso Carreker received hundreds of pills from trainers and injections from doctors of Medications. The Medications included Motrin 800, Tylenol-Codeine #3 and Percocet. He was taking three or four pills during the week and the nights before and after every game. The trainers had the pills in bags and handed them to Mr. Carreker for his use. Any player who asked to get a pill always received one and the trainers frequently volunteered pill availability. He also received frequent Cortisone injections in his knees and shoulders. Mr. Carreker was never informed of the possible side effects of any of these drugs. He never used any painkillers, anti-inflammatories or sleep aids before he signed his first contract with a Club. His experience with these Medications was substantially similar with each Club for whom he played.

242. Mr. Carreker discovered he had an infection in his heart in 2012 which caused severe inflammation around his heart. The anti-inflammatories he was given for that malady were ineffective due to the resistance he had built up to such drugs from the enormous quantities taken during his playing career. In or around September 2013 he underwent heart surgery to drain the

inflammation from around his heart. In or around 2008, Mr. Carreker was diagnosed with gouty arthritis as a result of his liver insufficiently processing the amount of uric acid in his body. This condition regularly causes pain, swelling and poor circulation in various joints including, but not limited to, his lower legs and feet. His doctors have advised him not to eat beef or pork because of his heart and stomach problems. Mr. Carreker has constant pain in his neck, back, ankles, knees and shoulders. He has had surgeries on his knees and has not yet decided on whether to have a recommended rotator cuff surgery.

243. Mr. Carreker believes that he was cut from the Denver Broncos in 1991 because of the injury to his back that was not given sufficient time to heal. No other team signed him, thus ending his career.

244. While playing in the NFL, Jerry Wunsch received hundreds of pills from trainers and injections from doctors of Medications, including Vicodin, Indocin and Toradol. He was taking some kind of painkiller or anti-inflammatory drug nearly every day in-season. The trainers either handed the pills directly to Mr. Wunsch or put them in an envelope. In one instance while playing for the Seattle Seahawks before a game against the Baltimore Ravens, Mr. Wunsch received a 1500 milligram dosage of Vicodin as well as Tylenol-Codeine # 3. On flights home, trainers for both organizations would walk up and down the aisles of the plane, handing out anti-inflammatories and pain killers to anyone who said they were in pain and needed them, no questions asked.

245. Mr. Wunsch also received Toradol shots from the Club doctor before many games and occasionally for practice. At one point, Mr. Wunsch was shot up with Hayalgan in his ankle, instead of being rested, and was told that the Hayalgan would act like oil to lubricate his gears because it was bone on bone in his ankle. Mr. Wunsch was never informed of the possible side effects of any of these drugs. He never used painkillers, anti-inflammatories or sleep aids before he

signed his first contract with a Club. Mr. Wunsch's experience with these Medications was far worse with the Seahawks than the Buccaneers.

246. On November 23, 2003, the Seattle Seahawks were playing the Baltimore Ravens in Baltimore. Before the game, Coach Holmgren asked Mr. Wunsch if he could play, to which Mr. Wunsch replied "I do not think so." Coach Holmgren then called for Sam Ramsden, the Seahawks' trainer, and asked "what can we do to help Mr. Wunsch play today." Mr. Ramsden brought the doctors over, who gave him a 750 mg dose of Vicodin and Tylenol-Codeine # 3, saying they would help, even though Mr. Wunsch was already taking anti-inflammatories as prescribed by his doctors. He played -- feeling high -- and after half time, the Medications wore off and he told anyone who would listen that he could not play anymore, but Mr. Ramsden gave him another 750 mg of Vicodin for the second half. In short, on top of the Indocin he was already taking, Mr. Wunsch was also given 1500 mg of Vicodin and Tylenol-Codeine # 3, within a three hour span, so he could play football.

247. Mr. Wunsch currently suffers from an enlarged liver, a damaged pituitary gland, stomach problems and other endocrine issues. He has no family history of medical problems with any of these organs. He is also in constant pain from all of his joints and has shooting nerve pains. Mr. Wunsch once was told by a Club doctor that he had torn his labrum. The doctor stated that, if he had surgery, his career would be over and recommended that he continue playing and manage the problem with Medications. Mr. Wunsch followed his doctor's advice. He also received pills and injections to play through various injuries to his ankles. After the last such injury, the Club doctor informed him that his ankles were so damaged he didn't think he could return him to play immediately with injections and pills. Shortly thereafter, the Club cut him and he never played again.

248. While playing in the NFL, Eric King received hundreds of pills from trainers and injections from doctors of Medications. Mr. King received many drugs from trainers, including Toradol, Celebrex, Percocet and OxyContin. The trainers frequently didn't tell him the name of the drug, just that he should take it to numb the pain and play. The trainers also gave him Ambien for sleeping before games. The trainers usually gave him the pills in an envelope, mostly blank but occasionally with his name. He also received injections of Toradol by Club doctors before several games. Mr. King also received injections in his left forearm, left shoulder and lower back. He was never informed of the possible side effects of using these Medications. He never used painkillers, anti-inflammatories or sleep aids before he signed his first contract with a Club. Mr. King's experience with these Medications was substantially similar with each Club for whom he played.

249. Mr. King lives with constant pain. During his career, he had two surgeries on his left forearm and one on his left shoulder. He also hurt his lower left back. In addition to the surgeries and injections, he was taking pills at least twice a week. The same left forearm and shoulder and back that were "fixed" by Club doctors bring pain to Mr. King's daily life.

250. While playing in the NFL, Steve Lofton received hundreds of pills from trainers and injections from doctors of Medications, including but not limited to Tramadol, Naproxen and muscle relaxants. Trainers would simply hand him pills and tell him that he needed to take them. The doctors who injected him never said the name of the drug he was being given. Mr. Lofton does remember that the drugs were being given out like M and M's, the candy. On the plane home from away games, a doctor would walk down the aisle, take pills from zip-lock bags and hand them to the players. Mr. Lofton remembers those flights as being strangely quiet as 53 players were numbed to sleep by the power of the drugs. He was never told by anyone of the side effects of the drugs. Mr. Lofton never used painkillers, anti-inflammatories or sleep aids before he signed his first contract

with a Club. His experience with these Medications was substantially similar with each Club for whom he played.

251. Mr. Lofton knows that his kidneys are performing below normal and have elevated serum creatinine concentrations. He is not currently on dialysis but his doctor is monitoring his kidneys for any signs of additional failure. He has no family history of any medical problems with kidneys. Mr. Lofton lives with intense pain every day. His back, neck, shoulders, elbows, wrists, hands, and hips constantly hurt. He has limited ability to exercise and his weight has increased from 185 to 226 pounds. He has recently developed pain in his knees and the lower part of his legs. Mr. Lofton has no family history of back or hip pain. He needs to sleep on a board or similar hard surface to get any rest. After his family leaves in the morning, he faces a day in which he simply tries to find ways to forget the pain for just a few hours. His doctor told him that, even though he was in his mid-40's, he had the body of someone in his mid-80's.

252. Mr. Lofton believes that if the major injuries he suffered had been given time to heal, and had not been masked by painkillers, he would have had a longer playing career. His contract with the Cardinals was terminated in 1993 because of an injury that was not given time to heal.

253. While playing in the NFL, Duriel Harris received hundreds of pills from trainers and injections from doctors of Medications. He also received numerous Cortisone injections. He remembers being given Vicodin but the trainers frequently didn't tell him the names of the drugs they gave him. Doctors were available once a week and at games. Trainers were always available. Trainers would simply hand pills out in unmarked envelopes. The training room was like a pharmacy with drugs sitting on shelves in a large locker. On the plane home from away games, trainers handed out Medications and alcohol. Mr. Harris was frequently told by trainers to take pills so he could play or he would be cut. He was never given any warnings or information about side effects. Mr. Harris never used any painkillers, anti-inflammatories or sleep aids before he signed his

first contract with a Club. His experience with these Medications was substantially similar with every Club for which he played.

254. On December 5, 1976, the Miami Dolphins were playing a home game against the Buffalo Bills. Mr. Harris was a 20-year-old rookie. He severely sprained ligaments in his ankle at the end of that game and practiced very little during the following week.

255. The Dolphins' final game of the year was the next week on December 11, 1976 at home against the Minnesota Vikings. Mr. Harris limped on to the field for pre-game warmups, not expecting to play. Head Coach Don Shula and Wide Receivers Coach Howard Shellenberger approached Mr. Harris and Coach Shula said "We need you – you need to play. We've talked to the doctors and they will give you a shot and you can play." Mr. Harris recalls the exchange as not presenting a choice and he was afraid he would be cut if he objected. He limped back to the training room and the trainer pulled off his shoe and cut the tape from his ankle. The Club doctor then gave him a Cortisone shot in the ankle and the trainer re-taped it. He played the game even though the shot wore off in the fourth quarter and he was hurt and visibly limping.

256. After the game, the trainer cut the tape off and the ankle ballooned up. Mr. Harris returned home and couldn't run for three months. The Dolphins then flew him to a California specialist who recommended more rest. Mr. Harris couldn't run or workout until June of 1977 which substantially inhibited his ability to train prior to the 1977 NFL season. The Dolphins finished with six wins and eight losses in 1976 so the Vikings game had no meaning *vis a vis* playoffs.

257. Mr. Harris' kidneys have an elevated serum creatinine concentrations. He is not on dialysis at this time, but his doctor is monitoring his kidney for any signs of additional failure. His heart also has an irregular beat due to an enlarged chamber. He takes daily pills to help the heart pump. While with the Browns, Mr. Harris' heart started racing and he needed pills to slow it down.

Even though he still played after the incident, he was never the same player. When he first arrived in Dallas, the player personnel director told him that if he didn't sign a medical waiver for his heart, the Club would cut him right then. Mr. Harris has also required surgery to remove one parathyroid gland after it was discovered that his parathyroid glands were improperly regulating the calcium levels in his body. He does not smoke or drink alcohol and he has no family history of kidney, heart or thyroid problems. Mr. Harris is also in constant pain from all of his joints. He has arthritis in his fingers and remembers a doctor stitching up the webbing of his hand at half time of a game. He also has pain from football injuries in his neck, back, hands, shoulders, knees and ankles.

258. Taking Medications in the manner described herein shortened Mr. Harris' playing career. After he started having heart issues, he became afraid to exert himself maximally for fear he would have a heart attack. As such, he was essentially playing football thereafter at "half speed," which ultimately was a reason his career ended. In addition, the injury to his ankle was not given sufficient time to heal, which contributed to him playing at "half speed."

259. While playing in the NFL, Mr. Graham received hundreds of pills from trainers and injections from doctors of Medications. He recalls taking in pill form Celebrex, Indocin, Toradol, Tylenol-Codeine # 3, Prednisone and Catephlam. Trainers also gave him pills without telling him the name of the drug he was receiving. These pills were handed to him by Club trainers or placed in envelopes or vials. For approximately the last seven years of his career, he received injections of Toradol twice a week – once for practice and before every game. He also received many injections of Cortisone in various injured body parts. Mr. Graham was frequently provided with alcohol by his Clubs during the return flight from away games. While playing for the San Diego Chargers during the 2000 NFL season, he suffered a break in the transverse process in his back. He missed one or two games and then played the remainder of the season with the break. The Club doctors and trainers allowed him to play while managing the pain with Medications. He was never told of the

side effects of any of these drugs. Mr. Graham did not use painkillers, anti-inflammatories or sleep aides before he signed his first contract with a Club. His experience regarding these Medications was substantially similar with each Club for whom he played.

260. Mr. Graham now lives in constant pain. He has pain in both shoulders, neck, hips, lower back, both elbows, both hamstrings, his fingers, wrists, left toe and right knee. He cannot stand for long periods and needs special shoes to lessen the pain. He is stiff and sore all day. He cannot sleep at night, moving from bed to floor to couch throughout the night. Mr. Graham struggles to control his weight due to his limited ability to exercise. He believes his current pain is completely attributable to various injuries suffered during his NFL career. Many were areas of painkiller injections and all were masked by the numerous drugs mentioned above as being given in pill form.

261. While playing in the NFL, Cedric Killings received hundreds of pills from trainers and injections from doctors of Medications. Mr. Killings remembers receiving a handful of Toradol injections from the Club doctor following an injury to his ankle. He did receive pills from trainers frequently during the regular season for his entire career for both games and practices. He also received them during the off season. Mr. Killings was occasionally told the name of the drug he was being given and can remember receiving Percocet and Vicodin from the trainers. In many instances, he was not told the name of the drug he was being given – he was simply told the pill would get him back on the field or alleviate the pain he was feeling. He can also recall being given drugs the trainers would refer to as "muscle relaxers." The pills were either given to Mr. Killings by hand or in an aluminum strip which allowed Mr. Killings to push the pills out as he needed them. He does not recall having any conversations with, nor being given any warnings by, any Club doctor or trainer about the possible side effects of taking the Medications. Mr. Killings' experience with these Medications was substantially similar with each Club for which he played.

262. Mr. Killings does recall that, during the 2003 season with the Minnesota Vikings, he sprained his right ankle in practice. The next morning, Head Coach Mike Tice told him that, if he was not able to practice that day, he would be released from the Club. Mr. Killings took Mediations given by the Club to ensure that he could practice in spite of the pain in his right ankle. He wanted to keep his job.

263. Mr. Killings has recently been placed on medication for high blood pressure. After retiring from professional football, he also experienced an inflamed gall bladder which necessitated the removal of the entire organ in an emergency surgery. Mr. Killings also has constant pain in his back, shoulders, knees, ankles and hands. He was taking pills and/or injections for pain in all of these areas during his playing career. Mr. Killings has no family history of high blood pressure, gall bladder problems or chronic pain in any of the joints mentioned herein. Prior to playing professional football, he has no recollection of taking any painkillers or anti-inflammatories.

264. While playing in the NFL, Reggie Walker received hundreds of pills from trainers and injections from doctors of Medications. Mr. Walker remembers receiving Toradol injections from the Club doctor before almost every game he played for the Cardinals and for every game his last year with the Chargers following a high ankle sprain he suffered in the Buffalo Bills game on September 21, 2014. Mr. Walker was occasionally told the name of the drug he was being given but just as often, if not more, he was not. He never had any conversations with and was never given any warnings by any Club doctor or trainer about the possible side effects of taking the Medications. Mr. Walker's experience with these Medications was substantially similar with both the Cardinal and Chargers.

265. Since retiring from the NFL, he has suffered the following injuries: his left pinky and ring fingers are always numb and that numbness extends all the way to his left elbow; he has particularly painful lower back problems; he often experiences pain in his ankles, knees and hips,

and his right leg feels shorter, and functions differently, than his left leg. As of the time of filing, Mr. Walker is only 29 years old.

CLASS ACTION ALLEGATIONS

266. Plaintiffs adopt by reference all allegations contained in the paragraphs above, as if fully set forth herein.

267. Plaintiffs bring this action on behalf of themselves and all other similarly-situated individuals pursuant to Fed. R. Civ. P. 23, consisting of all Players, which for class purposes shall mean anyone listed on one of the Clubs' rosters from the point in a season where a final roster decision is announced (for the 2016 season, this would have been when the 53 man roster was announced on September 3, 2016) through the completion of that season, who received Medications, which for class purposes shall mean any drug ever listed as a controlled substance and Toradol, from a Club and excluding Defendants, their employees and affiliates, and Judge Alsup.

268. The Class contains a sufficiently-large number of persons that joining all of their claims is impractical. Named Plaintiffs are but a few of the approximately 17,000 retired NFL players, most if not all of who are within the Class definitions, and over 1,300 retired NFL players who have signed Retention Agreements with undersigned counsel.

269. Numerous common questions of law and fact exist. They include, for example:

- Did Defendants conspire or otherwise agree, expressly or tacitly, to engage in the illegal procurement, storage, and/or administration of, and secrecy concerning, the Medications identified herein?

- Did Defendants provide or administer Medications to the Class Members as described above?

- Did Defendants intentionally provide or administer Medications to the Class Members as described above?

- Did Defendants violate the Controlled Substances Act's requirements governing acquisition of controlled substances?

- Did Defendants violate the Controlled Substances Act's requirements governing storage of controlled substances?

- Did Defendants violate the Controlled Substances Act's requirements governing distribution of controlled substances?

- Did Defendants violate the Food and Drug Act's requirements governing distribution of prescribed medications?

- Did the provision or administration of Medications to Class Members, as described above, violate state pharmaceutical laws regulating the acquisition, storage and dispensing of Medications?

- Did the Class Members provide informed consent authorizing the provision or administration of Medications?

- Did Defendants intentionally and affirmatively mislead Class Members about the dangers of health risks associated with provision and administration of Medications as described above?

- Did Defendants intentionally fail to disclose to Class Members the dangers of the health risks associated with provision and administration of Medications as described above?

- Did the Defendants' provision or administration of Medications as described above cause, in whole or in part, other injuries, illnesses, or disabilities of the Class Members?

- Did the Defendants' provision or administration of Medications as described above increase Class Member's risk of developing physical and mental health problems, injuries, disabilities, limitations and other problems in the future?

- Did the Defendants' provision or administration of Medications as described above proximately cause Class Members' economic losses, harms, lost earning potential, reduced earning capacity and other economic damages?

270. Plaintiffs and their claims are typical of the absent Class Members and their claims. Plaintiffs have the same incentives as the absent Class Members in this case, ensuring the proper representation of and advocacy for the absent Class Members' interests. Plaintiffs' claims arise from the same wrongful conduct the Defendants engaged in toward the absent Class Members.

271. Plaintiffs will adequately represent the Class Members. Plaintiffs have no conflicts of interest with the absent Class Members who Plaintiffs seek to represent. To the contrary, Plaintiffs' interests are fully aligned with the absent Class Members' interests in this action, in seeking redress for the Clubs' common wrongful conduct to both Plaintiffs and absent Class Members. Plaintiffs will fairly and adequately protect the interests of the absent Class Members.

272. Plaintiffs' counsel will properly and vigorously represent the Class Members. Plaintiffs' counsel have no conflicts of interest with the Plaintiffs and Class Members. Plaintiffs' counsel are experienced trial lawyers and litigators, with substantial experience in complex and class action litigation. Reflecting their commitment to this case and the protection of the absent Class Members, Plaintiffs' counsel have invested a great deal of time, money, legal research and factual investigative effort in developing and understanding the facts set forth in this Complaint and analyzing the best expression of those facts in legal theories and causes of action. Further underscoring Plaintiffs' counsel's qualifications and satisfaction of the adequacy of representation requirements, Plaintiffs' counsel have met with and received signed Retainer Agreements from over 1,300 Class Members.

273. The members of the Class are readily ascertainable and identifiable from reference to existing, objective criteria that are administratively practical, including records maintained by Defendants. Defendants have and maintain records reflecting the names of all of the Clubs' players, their games played, injuries sustained, medical and injury reports on the Class Members and certain

reports and records of the provision of medical, pharmacological, and other therapeutic treatments to the Class Members.

274. Common questions, such as those listed above, predominate over any questions affecting only individual members. As described above, and in light of the Defendants' common misconduct toward all of the Class Members, the Class is sufficiently cohesive to warrant class treatment. Plaintiffs, on behalf of the Class, allege a common body of operative facts and common legal claims relevant to each Class Member's condition and claims. Moreover, if necessary, Due Process compliant trial plans can be developed, at the appropriate time, to ensure the most efficient, practical and just resolution of the claims alleged herein.

275. A class action here is superior to other adjudicatory methods possibly available for resolving the Class's claim. First, Defendants are a $9 billion business annually and continuously growing, with virtually limitless resources to litigate against individual plaintiffs who have nowhere near the financial and legal firepower that Defendants can immediately muster. Second, those vast financial and economic resource disparities between individual Class Members and Defendants mean that many, if not most, of the claims of individual Class Members would languish un-redressed absent class action treatment. Third, the Class Members have not expressed interest in individually controlling the prosecution of separate actions. Judicial economy, economic efficiency, and the goal of avoiding inconsistent rulings and conflicting adjudications reflect the desirability of concentrating the litigation of the claims in this Complaint in the single forum this Court provides. With an appropriate trial plan, adjudicating the claims of the clearly defined Class above will not present undue difficulties for case management.

276. This action is properly maintainable as a class action under Fed. R. Civ. P. 23(b)(3). As described above, Defendants have acted or refused to act on grounds generally applicable to the Class such that questions of law or fact common to the Class predominate over any questions

affecting only individual members, making a class action superior to other available methods for fairly and efficiently adjudicating the controversy.

277. This action is also properly maintainable as a class action under Fed. R. Civ. P. 23(c)(4) in light of the nature and extent of the predominant common particular issues, exemplified in the common questions set forth above, generated by Defendants' consistent agreement, and consequent consistent policy, of promoting and facilitating the use of the Medications.

CAUSES OF ACTION

COUNT I – RICO

(Chris Goode, Darryl Ashmore, Jerry Wunsch, Alphonso Carreker, Steve Lofton, Duriel Harris, Etopia Evans and the Nationwide Class Against All Defendants)

278. Plaintiffs adopt by reference all allegations contained in the paragraphs above, as if fully set forth herein.

279. Plaintiffs bring this Count on behalf of a Nationwide Class against all defendants.

280. At all relevant times, defendants have been "person[s]" under 18 U.S.C. §1961(3) because they are capable of holding, and do hold, "a legal or beneficial interest in property." Specifically, the Clubs are incorporated entities and limited liability companies engaged in the business of football.

281. Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. §1962(c).

282. Section 1962(d) makes it unlawful for "any person to conspire to violate" §1962(c), among other provisions. 18 U.S.C. §1962(d).

283. For years, defendants have mandated a "return to play" practice or policy, as described in detail above, made possible by their illegal and indiscriminate distribution of

Medications, including controlled substances, to players without disclosing side effects and other important safety information (the "Scheme"). This Scheme maximized profits for defendants by keeping "their product" (per the PFATS web site, *supra*) – the players – on the field, even when they should not have been. Consequently, plaintiffs suffered injury to their business – their playing careers.

284. Defendants, along with other entities and individuals, were employed by or associated with, and conducted or participated in the affairs of, one or several RICO enterprises (defined below and referred to collectively as the "NFL Painkiller Abuse Enterprise"), the purpose of which was to increase revenues and profits for defendants, as well as minimize their financial losses from players' injuries by getting them back on the field immediately. As a direct and proximate result of their Scheme and common course of conduct, plaintiffs and the Class suffered harm to their business or property. As explained in detail below, Defendants' years-long misconduct violated §§1962(c) and (d).

A. The NFL Painkiller Abuse Enterprise

285. The NFL is an unincorporated trade association, headquartered in New York, New York.[5] The NFL constitutes a legal entity "enterprise" within the meaning of 18 U.S.C. §1961(4), through which defendants conducted their pattern of racketeering activity. Specifically, Defendants coordinated their policies and practices with respect to the Medications by and through the NFL and its various subdivisions and working groups. Every Club follows an agreed-upon program of mandating that their doctors and trainers distribute Medications to get injured players back on the

[5] "Originally organized in 1920, the NFL is an unincorporated association that now includes 32 separately owned professional football teams." *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 187 (2010). "The NFL was founded in Canton, Ohio, as the American Professional Football Association. It took its current name in 1922." *Id.* at n.1. Here, and throughout, internal citations and quotation marks are omitted, and emphasis is supplied, unless otherwise noted.

field at all costs. The NFL's separate legal status facilitated the Scheme and provided a hoped-for shield from liability for defendants and their co-conspirators.

286. Alternatively, Defendants, along with other individuals and entities, including their owners, doctors, and trainers, as well as unknown third parties involved in the Scheme, operated an association-in-fact enterprise, formed for the purpose of creating and maintaining a "return to play" practice of policy to boost their revenues and profits, and through which they conducted a pattern of racketeering activity under 18 U.S.C. §1961(4). The enterprises, alleged in this and the previous paragraph, are referred to collectively as the "NFL Painkiller Abuse Enterprise."

287. At all relevant times, the NFL Painkiller Abuse Enterprise constituted a single "enterprise" or multiple enterprises within the meaning of 18 U.S.C. §1961(4), as legal entities, and individuals and legal entities associated-in-fact for the common purpose of engaging in defendants' profit-making Scheme.

288. At all relevant times, the NFL Painkiller Abuse Enterprise: (a) had an existence separate and distinct from each Defendant; (b) was separate and distinct from the pattern of racketeering in which the Defendants were engaged; and (c) was an ongoing and continuing organization consisting of Defendants, their owners, trainers, and doctors, as well as other third-party entities and individuals associated for the common purpose of pumping players with Medications so they would stay on the field while omitting material safety information about those drugs. Each member of the enterprise shared in the bounty generated by the enterprise, *i.e.*, increased revenue and profits generated by the Scheme.

289. The NFL Painkiller Abuse Enterprise functioned by coordinating their policies and practices with respect to the illegal and indiscriminate Medication distribution to players. As described above, the Clubs managed the enterprise through committee meetings and informal agreements about their illegal and indiscriminate administration of the Medications to players.

Many of their efforts are legitimate, including medical treatment for the health and wellbeing of the player. However, Defendants and their co-conspirators, through the enterprise, engaged in a pattern of racketeering activity, which involves their illegal distribution of Medications and false or misleading information about those Medications, including material omissions about the side effects, safety, and addiction risks of the drugs.

290. The NFL Painkiller Abuse Enterprise engaged in, and its activities affected interstate commerce, as its commercial activities crossed state boundaries, with football games taking place all around the country, teams traveling between states, and teams obtaining Medications from other states, and defendants' receipt of monies from the same.

291. Specifically, upon information and belief, after the DEA presented to the Clubs in the Summer of 2009 in Indianapolis, Indiana regarding proper methods for storing and transporting controlled substances, employees and/or agents of the NFL met with representatives of SportPharm in the Fall of 2009 in San Diego and twice in New York City in early 2010 to discuss, among other things, oversight on the dispensation of controlled substances to players.

292. While Defendants participated in, and are members of, the enterprise, they have a separate existence from the enterprise, including distinct legal entities and statuses, different offices and roles, bank accounts, officers, directors, employees, individual personhood, reporting requirements, and financial statements.

293. Within the NFL Painkiller Abuse Enterprise, there was a common communication network by which Defendants and their co-conspirators shared information on a regular basis. The enterprise used this common communication network for the coordination of their policies and practices nationwide.

294. Each participant in the NFL Painkiller Abuse Enterprise had a systematic linkage to each other through corporate ties, contractual relationships, financial ties, and continuing

coordination of activities. Through the NFL Painkiller Abuse Enterprise, Defendants functioned as a continuing unit with the purpose of furthering the illegal Scheme and their common purpose of increasing revenues and market share, and minimizing losses. For example, as described herein, defendants formed the NFL Prescription Drug Advisory Committee (the "Committee"), to coordinate their common practices. The Committee meets at least twice a year, if not more, and includes NFL employees and team doctors, among others. Additionally, defendants coordinated through the Clubs issuing weekly injury reports to the NFL and through the NFL Security Office, the Physicians Society, the Combine, and the NFL Athletic Trainers Society. The NFL Security Office coordinates and/or did coordinate how Clubs obtained Medications. Regarding the Combine, trainers for all the Clubs met there and talked about the administration of Medications. Team doctors also met in the Summer of 2009 for a presentation from the DEA in Indianapolis regarding the interstate transportation of medications, at which time, they were warned that they could not transport controlled substances to away games. That warning notwithstanding, team doctors continued to do so, though they would leave their drugs on the plan and use the home team's "stash" to distribute to their players.

295. Through the Committee and routine meetings, Defendants participated in the operation and management of the NFL Painkiller Abuse Enterprise by directing its affairs. Moreover, in or around 2007, upon information and belief, some Defendants (including the Houston Texans, San Diego Chargers and Atlanta Falcons) and agreed to utilize a single computer software program, offered by a company known as SportPharm, to monitor and track, among other things, the ordering, shipment, delivery, dealing, and/or dispensing of Medications to players to further the illegal Scheme. Through SportPharm, as well as other pharmacies such as CVS, some Defendants were able to illegally obtain Medications through, *inter alia*, prescriptions written in the name of team doctors and trainers that were ultimately dealt to players to further the Scheme.

296. Defendants exerted substantial control over the NFL Painkiller Abuse Enterprise, and participated in the affairs of the enterprise by:

- coordinating on common policies or practices concerning the Medications;
- creating and maintaining a return to play practice or policy;
- illegally dealing in Medications that are listed controlled substances;
- concealing material safety information about the Medications;
- ensuring that other co-conspirators complied with the Scheme; and
- collecting revenues and profits from the Scheme.

297. Without Defendants' willing participation, the NFL Painkiller Abuse Enterprise's Scheme and common course of conduct would not have been successful.

298. Defendants directed and controlled the ongoing organization necessary to implement the Scheme at meetings and through communications of which Plaintiffs cannot fully know at present, because such information lies in the Defendants' and others' hands.

B. Violations of the Controlled Substances Act

299. To carry out, or attempt to carry out the Scheme, Defendants, each of whom is a person associated-in-fact with the NFL Painkiller Abuse Enterprise, did knowingly conduct or participate, directly or indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity within the meaning of 18 U.S.C. §1961(1)(A), which included dealing in controlled substances and/or listed chemicals in violation of the Controlled Substances Act, 21 U.S.C. §802.

300. Specifically, racketeering activity under RICO includes "any act or threat involving . . . dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [21 USCS §802]), which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. §1961(1)(A). It also includes the "felonious . . .

concealment, . . . or ***otherwise dealing*** in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States." 18 U.S.C. §1961(1)(D) (emphasis added). In turn, §102 of the Controlled Substances Act, 21 U.S.C. §802(6), defines a controlled substance as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this title [21 USCS §812]."

301. Section 102 of the Controlled Substances Act, 21 U.S.C. §802(6), defines a controlled substance as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this title [21 USCS §812]." Defendants concealed and/or dealt in Medications that included substances listed in the schedules of the Controlled Substances Act. For instance, Defendants concealed and/or dealt the following listed drugs: Oxycodone, Hydrocodone, Codeine, amphetamines, Darvocet, Tramadol, Ambien, Valium, and Librium.

302. Defendants have committed, conspired to commit, and/or aided and abetted in the commission of, at least two predicate acts of racketeering activity (*i.e.*, violations of the Controlled Substances Act), within the past 10 years. These multiple acts of racketeering activity were related to each other, posed a threat of continued racketeering activity, and therefore constitute a "pattern of racketeering activity." For the purpose of executing the illegal Scheme, Defendants committed these racketeering acts, which number in the hundreds, intentionally and knowingly with the specific intent to advance the illegal Scheme.

303. Defendants (or their agents), for the purpose of executing the Scheme, concealed and/or dealt in controlled substances or listed chemicals, including the items alleged below:

From	**To**	**Date**	**Description**
Arizona Cardinals	Robert Massey	Dec. 20, 1992	Jim Shearer gave plaintiff Vicodin on flight back from away game at Indianapolis.

From	To	Date	Description
Buffalo Bills	Eric King	Oct. 9, 2005	Shone Gipson gave plaintiff Vicodin at an away game at Dolphins stadium and on his flight home.
Chicago Bears	Jeff Graham	Sept. 23, 1995	Trainers provided Mr. Graham with Ambien in St. Louis.
Cincinnati Bengals	Troy Sadowski	Sept. 11, 1994	In the visitors' locker room of Qualcomm Stadium (then, Jack Murphy Stadium) following the San Diego game, trainers provided Mr. Sadowski with Tylenol-Codeine #3.
Cleveland Browns	Duriel Harris	Oct. 21, 1984	In the visitors' locker room of Riverfront Stadium following the Cincinnati game, trainers provided Mr. Harris with Tylenol-Codeine #3.
Denver Broncos	Alphonso Carreker	Dec. 24, 1989	In the visitors' locker room of Qualcomm Stadium (then, Jack Murphy Stadium) following the San Diego game, trainers provided Mr. Carreker with Vicodin (hydrocodone).
Detroit Lions	Eric King	Sept. 13, 2009	Dean Kleinschmidt gave Mr. King Vicodin at the team hotel in New Orleans.
Green Bay Packers	Alphonso Carreker	Nov. 10, 1985	During flight home following the Minnesota game, trainers provided Mr. Carreker with Vicodin (hydrocodone).
Indianapolis Colts	Chris Goode	Dec. 26, 1993	During flight home following the New England game, trainers provided Mr. Goode with Tylenol-Codeine #3.
Jacksonville Jaguars	Robert Massey	Oct. 10-12, 1996	Mike Ryan gave plaintiff Vicodin or Percocet at the team hotel in California in the days leading up to October 13, 1996 away game at Raiders stadium.
Kansas City Chiefs	Troy Sadowski	Aug. 23, 1991	In the visitors' locker room of Tampa Stadium following the Tampa Bay preseason game, trainers provided Mr. Sadowski with Tylenol-Codeine #3.

From	To	Date	Description
Miami Dolphins	Duriel Harris	Nov. 25, 1979	In the visitors' locker room of Memorial Stadium following the Baltimore game, and again on the flight home, trainers provided Mr. Harris with Tylenol-Codeine #3.
New Orleans Saints	Robert Massey	Nov. 6, 1989	Dean Kleinschmidt gave plaintiff Percocet on flight back from away game at San Francisco.
N.Y. Giants	Robert Massey	Dec. 7, 1997	Ronnie Barnes gave plaintiff Percocet or Vicodin on a bus ride back from an away game at Philadelphia.
New York Jets	Jeff Graham	Nov. 15, 1997	Trainers provided Mr. Graham with Ambien in Chicago.
Oakland Raiders	Darryl Ashmore	Late Aug., 2002	Rod Martin gave Mr. Ashmore Vicodin before practices held at the Raiders' training camp in Napa Valley.
Pittsburgh Steelers	Jeff Graham	Sept. 26, 1993	The night before the Atlanta game, trainers provided Mr. Graham with Ambien.
San Diego Chargers	Reggie Walker	Sept. 21, 2014	Before the Buffalo game, trainers provided Mr. Walker with painkillers that, upon information and belief, were either Vicodin or Percocet.
Seattle Seahawks	Jerry Wunsch	Nov. 22 – 23, 2003	Sam Ramsden gave Mr. Wunsch Ambien the night before an away game in Baltimore.
St. Louis Rams	Darryl Ashmore	Sept. 17, 1995	Jim Anderson gave Mr. Ashmore either Vicodin or Percocet at an away game at Panthers stadium.
Tampa Bay Buccaneers	Jerry Wunsch	Dec. 24, 2000	Todd Torcelli gave Mr. Wunsch Vicodin or Percocet on his flight back from Green Bay
Tennessee Titans	Eric King	Nov. 16, 2008	Brad Brown gave Mr. King Vicodin at an away game at Jaguars stadium.
Washington Redskins	Darryl Ashmore	Nov. 16, 1997	Bubba Tyler gave Mr. Ashmore either Vicodin or Percocet at an away game at Cowboys stadium.
Minnesota Vikings	Charles Evans	October 26, 1997	Vikings trainers gave Mr. Evans either Vicodin or Percocet on his flight back from Tampa Bay

304. Upon information and belief, the Baltimore Ravens, Buffalo Bills, Minnesota Vikings, Philadelphia Eagles and San Diego Chargers have, in the past five years, traveled illegally with controlled substances.

305. Upon information and belief, in the past ten years, the Clubs have committed the following violations of the Controlled Substances Act and/or its implementing regulations:

- Non-doctors administered controlled substances;
- Lack of documentation of dispensed controlled substances in their files;
- Dispensing controlled substances on planes, which could also be violations of state licensure laws if the plane was not in airspace of the state where the doctor administering the controlled substances was licensed to practice;
- Improper packaging/labeling of controlled substances;
- Prophylactic use of controlled substances;
- One registrant with the DEA using the script pad of another registrant;
- Traveling with controlled substances;
- Stockpiling controlled substances via prescription from a pharmacy not in the patient's name; and
- Prescriptions being written on a date prior to when the controlled substance was administered.

C. Mail and Wire Fraud

306. To carry out, or attempt to carry out the Scheme, Defendants, each of whom is a person associated-in-fact with the NFL Painkiller Abuse Enterprise, did knowingly conduct or participate, directly or indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity within the meaning of 18 U.S.C. §§1961(1), 1961(5) and 1962(c), and which

employed the use of the mail and wire facilities, in violation of 18 U.S.C. §§1341 (mail fraud) and 1343 (wire fraud).

307. Specifically, Defendants have committed, conspired to commit, and/or aided and abetted in the commission of, at least two predicate acts of racketeering activity (*i.e.*, violations of 18 U.S.C. §§1341 and 1343), within the past 10 years. These multiple acts of racketeering activity were related to each other, posed a threat of continued racketeering activity, and therefore constitute a "pattern of racketeering activity."

308. The racketeering activity was made possible by Defendants' regular use of the facilities, services, distribution channels, and employees of the NFL Painkiller Abuse Enterprise. Defendants participated in the Scheme by using mail, telephone and the Internet to transmit mailings and wires in interstate commerce.

309. Defendants used, directed the use of, and/or caused to be used, thousands of interstate mail and wire communications in service of their Scheme through virtually uniform misrepresentations, concealments and material omissions.

310. In devising and executing the illegal Scheme, Defendants devised and knowingly carried out a material scheme and/or artifice to defraud plaintiffs by means of materially false or misleading representations and/or omissions of material facts. Defendants concealed material safety information from the players by, for example, when being asked about side effects of the medications, club doctors and trainers responded, "none," "don't worry about them," "not much," "they are good for you," or, in the case of injections, "maybe some bruising."

311. Defendants also omitted information, as described *supra* at paragraph 114.

312. Defendants further concealed information legally required to be provided to players under the Controlled Substances Act including, among other things, information required to be placed on prescription drug labels.

313. Defendants' predicate acts of racketeering (18 U.S.C. §1961(1)) include, but are not limited to:

(a) Mail Fraud: Defendants violated 18 U.S.C. §1341 by sending or receiving, or by causing to be sent and/or received, materials via U.S. mail or commercial interstate carriers for the purpose of executing the unlawful Scheme by means of false pretenses, misrepresentations, and/or omissions; and

(b) Wire Fraud: Defendants violated 18 U.S.C. §1343 by transmitting and/or receiving, or by causing to be transmitted and/or received, materials by wire for the purpose of executing the unlawful scheme based on false pretenses, misrepresentations, and/or omissions.

314. Defendants have used – or caused to be used – mailing and wires to carry out (or attempt to carry out) an essential part of the Scheme. Defendants' use of the mails and wires include, but are not limited to, the transmission, delivery, or shipment of the following by defendants or third parties that were foreseeably caused to be sent as a result of the Scheme:

(a) orders of Medications;

(b) shipments of the Medications;

(c) invoices for the Medications;

(d) communications about the Medications;

(e) false or misleading communications intended to lull players and/or others from discovering the safety risks of the Medications;

(f) packaging and labeling that concealed the true nature of the Medications;

(g) documents intended to facilitate the Medication abuse, including shipping records, reports, and correspondence;

(h) revenues and profits to Defendants;

(i) other paperwork and communications concerning the Medications;

(j) meeting invitations, agendas, and minutes among Defendants and/or their trainers and/or doctors;

(k) documents and communications that facilitated the coordination of Defendants' administration of the Medications;

(l) bills of lading, invoices, shipping records, reports and correspondence;

(m) payments to pharmacies and/or suppliers;

(n) deposits of proceeds; and

(o) other documents and things, including electronic communications.

315. Specifically, between the Fall of 2009 and June 2010, the Houston Texans, Atlanta Falcons, and San Diego Chargers, and upon information and belief, other Defendants, received shipments of prescription Medications and re-packaged bulk purchase orders for Medications from SportPharm in San Diego, California by way of UPS or FedEx. The specific records showing the dates of such shipments, the locations shipped to, and the specific prescription and bulk purchase orders of Medications shipped via UPS or FedEx are located in the records of RSF Pharmaceuticals, Inc. (d/b/a SportPharm), Defendants, UPS and/or FedEx. In addition, upon information and belief, countless records of ordering and shipping Medications for Defendants from SportPharm were seized by the DEA during a raid of SportPharm in 2010 and remain in the hands of the DEA.

316. Between the Fall of 2009 and June 2010, the Houston Texans, Atlanta Falcons and San Diego Chargers, among (upon information and belief) many other, if not all, Defendants, ordered through telephone calls and facsimiles made through interstate commerce prescription Medications and re-packaged bulk purchase orders for Medications from SportPharm in San Diego, California. The specific records showing the dates of such prescription orders of Medications and bulk purchase orders of Medications are located in the records of RSF Pharmaceuticals, Inc. (d/b/a

SportPharm) or the Defendants. In addition, upon information and belief, countless records of ordering and shipping Medications for Defendants from SportPharm were seized by the DEA during a raid of SportPharm in 2010 and remain in the hands of the DEA.

317. Defendants also communicated by U.S. mail, by interstate facsimile, and by interstate electronic mail with various third parties, including, but not limited to, pharmacies such as CVS, Walgreen, Eckerd, Rite-Aid, and RSF Pharmaceuticals, SportPharm, physicians, NFL executives, and Committee members, in furtherance of the Scheme, between 2007 and 2010 at a minimum. The mail and wire transmissions described herein were made in furtherance of the Scheme and common course of conduct.

318. Many of the precise dates of the fraudulent uses of the U.S. mail and interstate wire facilities have been deliberately hidden, and cannot be alleged without access to Defendants' books and records. However, Plaintiffs have described the types of, and in some instances, occasions on which the predicate acts of mail and/or wire fraud occurred. They include thousands of communications to perpetuate and maintain the Scheme, including the things and documents described in the preceding paragraphs.

D. Conspiracy

319. Defendants have not undertaken the practices described herein in isolation, but as part of a common scheme and conspiracy. In violation of 18 U.S.C. §1962(d), Defendants conspired to violate 18 U.S.C. §1962(c), as described herein. Various other persons, firms and corporations, including third-party entities and individuals not named as defendants in this Complaint have participated as co-conspirators with Defendants in these offenses and have performed acts in furtherance of the conspiracy to increase or maintain revenues, increase market share, and/or minimize losses for Defendants and their unnamed co-conspirators throughout the illegal scheme and common course of conduct.

320. Defendants aided and abetted others in the violations of the above laws, thereby rendering them indictable as principals in the 18 U.S.C. §§1341 and 1343 offenses.

321. To achieve their common goals, Defendants obfuscated the true nature of the Medications. Defendants suppressed and/or ignored warnings from third parties, whistleblowers, and/or governmental entities about their illegal and indiscriminate administration of Medications.

322. Defendants and each member of the conspiracy, with knowledge and intent, have agreed to the overall objectives of the conspiracy and participated in the common course of conduct to commit acts of fraud and indecency in the administration of the Medications.

323. Indeed, for the conspiracy to succeed, each Defendant and its co-conspirators had to agree to implement and use the similar devices and fraudulent tactics because of the mobility of players, doctors, and trainers.

E. Injury

324. Defendants engaged in the Scheme to administer Medications to players without disclosing the side effects so as to maximize their own short-term profits, while risking the players' health and careers. Defendants knew and intended that Plaintiffs would rely on the material representations and/or omissions made by them, their representatives, and/or agents about the Medications. As fully alleged herein, Plaintiffs, along with other NFL players, relied upon Defendants' representations and/or omissions that were made or caused by them and consequently took the Medications without accurate and/or adequate information about the material safety risks. Alternatively, the injuries that Plaintiffs have suffered – described below – are the direct and foreseeable result of the Clubs having engaged in the conduct described herein.

325. Defendants engaged in a pattern of related and continuous predicate acts for years. The predicate acts constituted a variety of unlawful activities, each conducted with the common purpose of obtaining significant monies and revenues from keeping players out on the field at any

cost, sacrificing the players' health and career prospects for defendants' profits. By reason of, and as a result of the conduct of Defendants, and in particular, their pattern of racketeering activity, Plaintiffs and Class members have been injured in their business in multiple ways, including but not limited to:

(a) loss of employment and/or independent contractor position;

(b) diminished marketability, earnings, endorsements, and/or business contracts;

(c) shortening their playing careers;

(d) interference with prospective business relations, such as coaching, announcing, sidelines, working for the Club; and

(e) other losses to their business or property, such as lost employment or business opportunities and/or contracts.

326. Defendants' violations of 18 U.S.C. §§1962(c) and (d) have directly and proximately caused injuries and damages to plaintiffs and Class members, and plaintiffs and Class members are entitled to bring this action for three times their actual damages, as well as injunctive/equitable relief, costs, and reasonable attorneys' fees pursuant to 18 U.S.C. §1964(c).

COUNT II – INTENTIONAL MISREPRESENTATION

(All Plaintiffs except Reggie Walker Against All Defendants)

327. Plaintiffs adopt by reference all allegations contained in the paragraphs above, as if fully set forth herein.

328. The Clubs continuously and systematically made intentional misrepresentations to Class Members as documented herein about the Medications that they provided.

329. The Clubs continuously and systematically misrepresented the increased risk of latent injuries resulting from the Medications.

330. The Clubs continuously and systematically misrepresented to the Class Members the dangers of playing while the pain of injuries was masked by the Medications, including the risk of further and permanent damage to affected body parts.

331. The Clubs misrepresented material facts, extremely important to understanding the dangers of the Medications, to the Class Members.

332. The Clubs knew that the representations were false or made the representations with such reckless disregard for the truth that knowledge of the falsity of the statement can be imputed to the Clubs.

333. The Clubs intended to deceive the Class Members through its knowing and intentional misrepresentations.

334. The Clubs knew that Class Members would rely on what they said about the Medications that kept the Class Members on the field.

335. The Class Members reasonably relied on what the Clubs did say – "here you go, take this and get out there." That message did not include: disclosure of the numerous and serious risks associated with the Medications; the need for informed consent; the need for independent medical evaluation, diagnoses and prescription; the need for monitoring for toxicity, potentially serious or even fatal drug interactions; and any recognition of, let alone adherence to, limitations on frequency and duration of the Class Member's exposure to these Medications.

336. The Class Members reasonably believed the Clubs were taking their best interests into consideration when they provided and administered Medications.

337. The atmosphere of trust inherent in locker rooms, in which players become friendly with their Clubs' medical and training staffs, inured the Class Members to any suspicion that the Medications they were given and administered might be dangerous.

338. The Class Members reasonably believed the Clubs would not act illegally and, in doing so, injure the Class Members and put them at risk of substantial and continuing future injuries.

339. The Class Members were in fact deceived by the Club's misrepresentations, and justifiably acted and detrimentally relied on those intentional misrepresentations.

340. The Clubs are liable for their intentional misrepresentations to the Class Members.

341. The Clubs' intentional misrepresentations were a cause in fact of the Class Members' damages, injuries and losses, both economic and otherwise, alleged in this Complaint.

342. The Clubs' intentional misrepresentations proximately caused the Class Members' damages, injuries and losses, both economic and otherwise, alleged in this Complaint, all of which are ongoing and will continue for the foreseeable future.

343. The Class Members suffered damages and losses factually and proximately caused by their reasonable and justifiable reliance on the Clubs' intentional misrepresentations and omissions about the Medications.

344. The Clubs are liable to the Class Members for all categories of damages, in the greatest amounts permissible under applicable law.

345. As a result of the foregoing uniform, agreement-based misrepresentations, Plaintiffs and the Class Members ingested vast amounts of opioids, anti-inflammatories and other analgesics, and local anesthetics during their NFL careers that they otherwise would not have, all of which occurred without proper medical diagnosis, supervision and monitoring; in quantities exceeding recommended dosages; and for periods far longer than recommended treatment intervals.

346. As a result of Defendants' provision and administration of Medications, the Class Members are currently suffering from, or at a substantially-increased risk of developing, physical and/or internal injuries resulting from the provision and administration of the Medications.

347. Such injuries, and the substantially-increased risks thereof, are latent injuries. They develop over time, often undetected at first because the absence, paucity or modest nature of early symptoms are readily explained away as "old age" or caused by some other factor independent of Defendants' provision and administration of Medications.

348. Such latent injuries include, without limitation, musculoskeletal deterioration, arthritic and osteoarthritic progression, and damage to internal organs.

349. Defendants had superior knowledge to that of the Class Members concerning the current use, and latent injuries, associated with the provision and administration of the Medications to the Class Members.

350. Despite that knowledge, Defendants systematically misrepresented to the Class Members that Defendants' administration of the Medications would have no adverse impact on their health or concealed the scope of injuries from which the Class Members might suffer.

351. The Class Members' latent injuries, and substantially increased risks of developing physical maladies later in their lives, necessitate specialized medical investigation, monitoring, testing and treatment not generally required by or given to the public at large.

352. The testing and medical monitoring regime required for the Class Members is specific to their experience with the Clubs' provision and administration of the Medications.

353. Persons not exposed to the Medications that the Clubs provided and administered to the Class Members would not require a testing and medical monitoring regime like that necessary to protect the Class Members.

354. The testing and medical monitoring regime will include baseline testing of each Class Member, with diagnostic examinations, to determine whether the Class Member is currently suffering from any of the physical injuries associated with the Medications.

355. This testing and medical monitoring regime will also include evaluations of the non-currently symptomatic Class Members to determine whether, and, if so, by how much, they are at increased risk for developing the injuries at issue in the future.

356. This testing and medical monitoring regime will help to prevent, or mitigate, the numerous adverse health effects the Class Members suffered and will suffer from Defendants' provision and administration of the Medications.

357. Scientifically-sound and well-recognized medical and scientific principles and observations support the efficacy of the testing and medical monitoring regime the Class Members require.

358. Testing and monitoring the Class Members will help prevent or mitigate the development of the injuries at issue.

359. Testing and monitoring the Class Members will help to ensure that they do not go without adequate treatment that could either prevent, or mitigate, the occurrence of the injuries at issue.

360. In addition to compensatory and punitive damages against Defendants, Plaintiffs seek a mandatory continuing injunction creating and imposing a Court-ordered, Defendants-funded testing and medical monitoring program to help prevent the occurrence of Medication-caused injuries and disabilities, to help ensure the prompt diagnosis and early treatment necessary to reduce the degree or slow the progression of such Medication-caused problems, and otherwise to facilitate the treatment of such problems.

361. This testing and medical monitoring program should include a trust fund, under the supervision of the Court or Court-appointed Special Master who makes regular reports to the Court about the fund.

362. This trust fund is required to pay for the testing and medical monitoring and treatment the Class Members require as a matter of sound medical practice, regardless of the frequency, cost or duration of such testing, monitoring and treatments.

363. Plaintiffs have no adequate legal remedy with regard to the latent injuries described herein. Money damages are by themselves insufficient to compensate the Plaintiffs and Class Members for the continuing risks associated with such injuries.

364. Absent the testing and medical monitoring program described in the preceding paragraphs, the Plaintiffs will remain unprotected against the continuing risk, created by Defendants' misconduct, of subsequent development and manifestation of physical injuries that are now latent.

COUNT III – CONCEALMENT

(All Plaintiffs Against All Defendants)

365. Plaintiffs adopt by reference all allegations contained in the paragraphs above, as if fully set forth herein.

366. The Clubs continuously and systematically failed to provide Class Members with prescriptions, as illustrated by examples provided herein.

367. The Clubs continuously and systematically failed to identify medications they provided to Class Members by their established name, as illustrated by examples provided herein.

368. The Clubs continuously and systematically failed to provide adequate directions for the use of Medications they provided the Class Members, as illustrated by examples provided herein.

369. The Clubs continuously and systematically failed to include adequate warnings of uses of the Medications they provided the Class Members that have potentially dangerous health consequences, as illustrated by examples provided herein.

370. The Clubs continuously and systematically failed to provide the recommended or usual dosage for the Medications they provided the Class Members, as illustrated by examples provided herein.

371. The foregoing omissions relate to material facts that the Clubs were required to provide to the Class Members under federal and state law as detailed herein.

372. The Clubs intended to deceive the Class Members through their intentional omissions.

373. The Clubs know that, had they made these disclosures to the Class Members, the Class Members would not have ingested Medications in the manner described herein.

374. The Class Members reasonably believed the Clubs were taking their best interests into consideration when they provided and administered Medications.

375. The atmosphere of trust inherent in locker rooms, in which players become friendly with their Clubs' medical and training staffs, inured the Class Members to any suspicion that the Medications they were given and administered might be dangerous.

376. The Class Members reasonably believed the Clubs would not act illegally and, in doing so, injure the Class Members and put them at risk of substantial and continuing future injuries.

377. The Class Members were in fact deceived by the Club's intentional omissions, and justifiably acted and detrimentally relied on those intentional omissions.

378. The Clubs are liable for their omissions to the Class Members.

379. The Clubs' omissions were a cause in fact of the Class Members' damages, injuries and losses, both economic and otherwise, alleged in this Complaint.

380. The Clubs' omissions proximately caused the Class Members' damages, injuries and losses, both economic and otherwise, alleged in this Complaint, all of which are ongoing and will continue for the foreseeable future.

381. The Class Members suffered damages and losses factually and proximately caused by their reasonable and justifiable reliance on the Clubs' omissions relating to the Medications.

382. As a result of the foregoing uniform, agreement-based omissions, Plaintiffs and the Class Members ingested vast amounts of Medications during their NFL careers that they otherwise would not have, all of which occurred without proper medical diagnosis, supervision and monitoring; in quantities exceeding recommended dosages; and for periods far longer than recommended treatment intervals.

383. As a result of Defendants' provision and administration of Medications, the Class Members are currently suffering from, or at a substantially-increased risk of developing, physical and/or internal injuries resulting from the provision and administration of the Medications.

384. Such injuries, and the substantially-increased risks thereof, are latent injuries. They develop over time, often undetected at first because the absence, paucity or modest nature of early symptoms are readily explained away as "old age" or caused by some other factor independent of Defendants' provision and administration of Medications.

385. Such latent injuries include, without limitation, musculoskeletal deterioration, arthritic and osteoarthritic progression, and damage to internal organs.

386. Defendants had superior knowledge to that of the Class Members concerning the current use, and latent injuries, associated with the provision and administration of the Medications to the Class Members.

387. Despite that knowledge, Defendants systematically misrepresented to the Class Members that Defendants' administration of the Medications would have no adverse impact on their health or concealed the scope of injuries from which the Class Members might suffer.

388. The Class Members' latent injuries, and substantially increased risks of developing physical maladies later in their lives, necessitate specialized medical investigation, monitoring, testing and treatment not generally required by or given to the public at large.

389. The testing and medical monitoring regime required for the Class Members is specific to their experience with the Clubs' provision and administration of the Medications.

390. Persons not exposed to the Medications that the Clubs provided and administered to the Class Members would not require a testing and medical monitoring regime like that necessary to protect the Class Members.

391. The testing and medical monitoring regime will include baseline testing of each Class Member, with diagnostic examinations, to determine whether the Class Member is currently suffering from any of the physical injuries associated with the Medications.

392. This testing and medical monitoring regime will also include evaluations of the non-currently symptomatic Class Members to determine whether, and, if so, by how much, they are at increased risk for developing the injuries at issue in the future.

393. This testing and medical monitoring regime will help to prevent, or mitigate, the numerous adverse health effects the Class Members suffered and will suffer from Defendants' provision and administration of the Medications.

394. Scientifically-sound and well-recognized medical and scientific principles and observations support the efficacy of the testing and medical monitoring regime the Class Members require.

395. Testing and monitoring the Class Members will help prevent or mitigate the development of the injuries at issue.

396. Testing and monitoring the Class Members will help to ensure that they do not go without adequate treatment that could either prevent, or mitigate, the occurrence of the injuries at issue.

397. In addition to compensatory and punitive damages against Defendants, Plaintiffs seek a mandatory continuing injunction creating and imposing a Court-ordered, Defendants-funded testing and medical monitoring program to help prevent the occurrence of Medication-caused injuries and disabilities, to help ensure the prompt diagnosis and early treatment necessary to reduce the degree or slow the progression of such Medication-caused problems, and otherwise to facilitate the treatment of such problems.

398. This testing and medical monitoring program should include a trust fund, under the supervision of the Court or Court-appointed Special Master who makes regular reports to the Court about the fund.

399. This trust fund is required to pay for the testing and medical monitoring and treatment the Class Members require as a matter of sound medical practice, regardless of the frequency, cost or duration of such testing, monitoring and treatments.

400. Plaintiffs have no adequate legal remedy with regard to the latent injuries described herein. Money damages are by themselves insufficient to compensate the Plaintiffs and Class Members for the continuing risks associated with such injuries.

401. Absent the testing and medical monitoring program described in the preceding paragraphs, the Plaintiffs will remain unprotected against the continuing risk, created by Defendants' misconduct, of subsequent development and manifestation of physical injuries that are now latent.

COUNT IV – CIVIL CONSPIRACY

(All Plaintiffs Against All Defendants)

402. Plaintiffs adopt by reference all allegations contained in the paragraphs above, as if fully set forth herein.

403. Since at least the mid-1960s, the Clubs, by agreement or understanding, created a practice or policy that places an emphasis on returning players to the field as soon as possible with little if any consideration for the short or long-term effects such return to play will have on the players' health. They have done so in part by violating Federal and State laws as detailed herein.

404. The Clubs have acted on their agreement or understanding through intentional misrepresentations and/or concealment and omissions that they have made to players about the Medications and their health as detailed herein. Through these intentional misrepresentations and omissions, the Clubs have coerced players to return to play far sooner than they should have, to the Clubs' benefit and the players' detriment.

405. The Clubs' intentional misrepresentations and omissions were a cause in fact of the Class Members' damages, injuries and losses, both economic and otherwise, alleged in this Complaint.

406. The Clubs' intentional misrepresentations proximately caused the Class Members' damages, injuries and losses, both economic and otherwise, alleged in this Complaint, all of which are ongoing and will continue for the foreseeable future.

407. The Class Members suffered damages and losses factually and proximately caused by their reasonable and justifiable reliance on the Clubs' intentional misrepresentations and omissions about the Medications.

408. The Clubs are liable to the Class Members for all categories of damages, in the greatest amounts, permissible under applicable law.

PRAYER FOR RELIEF

409. WHEREFORE, Plaintiffs pray for judgment as follows:

a. Granting an injunction and/or other equitable relief against Defendants and in favor of Plaintiffs for medical monitoring;

b. Awarding Plaintiffs compensatory damages against Defendants;

c. Awarding treble damages under RICO;

d. Awarding Plaintiffs punitive damages against Defendants;

e. Awarding Plaintiffs such other relief as may be appropriate; and

f. Granting Plaintiffs their prejudgment interest, costs and attorneys' fees.

DATED: November 30, 2016

William N. Sinclair
Steven D. Silverman
Stephen G. Grygiel
Phillip J. Closius
Alexander Williams
SILVERMAN|THOMPSON|SLUTKIN|WHITE|LLC

/s/
William N. Sinclair

201 N. Charles Street, Suite 2600
Baltimore, MD 21201
Telephone: (410) 385-2225
Facsimile: (410) 547-2432

Thomas J. Byrne
Mel T. Owens
NAMANNY BYRNE & OWENS, P.C.
2 South Pointe Drive, Suite 245
Lake Forest, CA 92630
Telephone: (949) 452-0700
Facsimile: (949) 452-0707

Stuart A. Davidson
Mark J. Dearman
Janine D. Arno
ROBBINS GELLER RUDMAN & DOWD LLP
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: (561) 750-3000
Facsimile: (561) 750-3364

Rachel L. Jensen (SBN 211456)
ROBBINS GELLER RUDMAN & DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: (619) 231-1058
Facsimile: (619) 231-7423

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I am employed in the City of Baltimore, State of Maryland. I am over the age of 18 and not a party to the within action; my business address is 201 N. Charles St., Suite 2600, Baltimore, MD 21201 and my email address is bsinclair@mdattorney.com.

On November 30, 2016, I caused to be served the following documents described as:

PLAINTIFFS' AMENDED COMPLAINT

on the following interested parties:

Gregg Levy
glevy@cov.com
Benjamin Block
bblock@cov.com
Sonya Winner
swinner@cov.com
Rebecca Jacobs
rjacobs@cov.com
Laura Wu
lwu@cov.com

Allen Ruby
allen.ruby@skadden.com
Jack DiCanio
jdicanio@skadden.com

Daniel Nash
dnash@akingump.com
Stacey Eisenstein
seisenstein@akingump.com

Jodi Avergun
Jodi.Avergun@cwt.com

by:

x_____(BY ELECTRONIC SERVICE VIA CM/ECF SYSTEM) In accordance with the electronic filing procedures of this Court, service has been effected on the aforesaid party(s) above, whose counsel of record is a registered participant of CM/ECF, via electronic services through the CM/ECF system.

______(BY PERSONAL SERVICE)

______(BY EMAIL) I am readily familiar with the firm's practice of email transmission; on this date, I caused the above-referenced document(s) to be transmitted by email and that the transmission was reported as complete and without error.

______(BY MAIL) I am readily familiar with the firm's practice for the collection and processing of correspondence for mailing with the United States Postal Service and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business; on this date, the above-referenced correspondence was placed for deposit at Baltimore, Maryland and placed for collection and mailing following ordinary business practices.

______(BY FEDERAL EXPRESS) I am readily familiar with the firm's practice for the daily collection and processing of correspondence for deliveries with the Federal Express delivery service and the fact that the correspondence would be deposited with Federal Express that same day in the ordinary course of business; on this date, the above-referenced document was placed for deposit at Baltimore, Maryland and placed for collection and overnight delivery following ordinary business practices.

I declare under penalty of perjury under the laws of the State of Maryland that the above is true and correct.

Executed on November 30, 2016 at Baltimore, Maryland.

/s
Bill Sinclair

EXHIBIT A

GENERAL RELEASE REGARDING TORADOL

I have requested that I be treated with Toradol (brand name for Ketorolac tromethamine) for an injury or injuries.

Information About Toradol

I understand that Toradol is a potent non-steroidal anti-inflammatory drug (NSAID) designed to blunt the body's inflammatory response to injury, control pain and assist in the return to active sports. I understand that Toradol can have a number of side effects. For example, it can have adverse effects on kidneys and kidney function. It should not be used by persons with kidney problems, active peptic ulcer disease or gastrointestinal bleeding or perforation, or a history of complications related to NSAIDs. It should not be used by persons with closed head injuries and/or bleeding in the brain. It may also increase the risk of internal bleeding in other parts of the body and can negatively impact fracture healing. Toradol should not be used for more than 5 days.

I understand that the above description is not a complete description of persons who should not take Toradol or the risks of doing so. Additional important information about Toradol, such as medical conditions of persons who should not take it, symptoms that may indicate negative reactions to it and other guidelines and warnings can be found in the written instructions/warnings accompanying a Toradol prescription and on websites such as http://www.drugs.com/toradol.html and http://en.wikipedia.org/wiki/Ketorolac.

A Task Force appointed by the NFL's Team Physicians Society studied Toradol and its use and made some recommendations. Paraphrased, those recommendations are:

1. The drug should be administered only under the direct supervision and order of a team physician.

2. It should not be used prophylactically to reduce anticipated pain either during or after football games or practices.

3. Its use should be limited to players who are diagnosed with an injury and listed on the team's latest injury report.

4. It should be given in the lowest effective therapeutic dose and should not be used for more than 5 days.

5. In typical situations, it should be administered orally (i.e. in pill form).

6. It should not be injected (either intravenously or intramuscularly) except after an acute game-related injury in which significant visceral or central nervous system bleeding is not expected and where oral or intranasal pain medications are inadequate or not tolerated.

7. It should not be taken with other NSAIDs or aspirin.

8. It should not be taken by players with a history of allergic reaction or complications due to other NSAIDS or aspirin, nor by players with a history of significant GI bleeding or kidney problems.

The full report is available online at http://m.sph.sagepub.com/content/4/5/377.full.pdf.

I have been encouraged to review the information and websites mentioned above and I confirm that I have done so. I further understand that I have the opportunity to discuss the use of Toradol with an independent physician of my choice, my agent, or anyone else. I confirm that the Chargers and their team doctors and trainers are not pressuring me to use it. The decision is entirely mine to make.

I have no history of any problems such as those described above or in the referenced literature, nor of any allergic reaction(s) to NSAIDs or aspirin. I am not currently taking any other NSAID or aspirin and understand I should not do so at the same time as taking Toradol.

Confirmation of No Contraindicators
(Check "yes" or "no" for each of the following. If "yes," explain below:

Yes ☐	No ☐	History of renal (kidney) problems?
Yes ☐	No ☐	Taking any aspirin or other NSAIDs (such as Celebrex, Naprosyn, Indicin or Ibuprofen - see prescription literature for complete list)?
Yes ☐	No ☐	Taking any other contraindicated drug (such as Prozac or Lexapro - see prescription literature for complete list)?
Yes ☐	No ☐	History of gastrointestinal bleeding or perforation?
Yes ☐	No ☐	History of internal bleeding?
Yes ☐	No ☐	History of closed head injuries or bleeding in the brain?
Yes ☐	No ☐	History of active peptic ulcer disease?

Add explanations for any "yes" responses:

GENERAL RELEASE FROM LIABILITY

I hereby agree to this Release From Liability as a condition to my being prescribed Toradol in connection with my practicing for and/or playing in professional football games for the San Diego Chargers. I understand and acknowledge that my use of Toradol is entirely voluntary.

I am aware and I acknowledge that there can be serious risks of medical complications and personal injury associated with taking the drug. Despite these risks, I am choosing to take it and **I HEREBY AGREE TO VOLUNTARILY ASSUME AND ACCEPT ANY AND ALL RISKS RELATED TO TAKING TORADOL, WHETHER KNOWN OR UNKNOWN, INCLUDING RISK OF MEDICAL COMPLICATIONS, PERSONAL INJURY AND DEATH.**

I, and anyone acting on my behalf or otherwise exercising my rights, agree not to make a claim against, sue, seek damages from, or attach the property of the Chargers Football Company, LLC ("Chargers"), Oasis MSO, Dr. David Chao, Dr. Daniel Rotenberg, Dr. Calvin Wong and their affiliated organizations, subsidiaries, partners, owners, shareholders, directors, officers, employees, agents, insurers, affiliates, successors and/or assigns, or any other team physician, trainer, employee or other person working for or affiliated with the Chargers, my teammates, or any other person or entity (the "Released Parties") for any injury, damage or death sustained due to taking Toradol.

I, and anyone acting on my behalf or otherwise exercising my rights, agree to release, indemnify, and hold harmless the Released Parties from and against any and all liability claims, losses or damages of any kind, injury, death or damage to myself, or to any other person or property arising either directly or indirectly by reason of the use of Toradol.

I certify here and below that I have no conditions or limitations that would preclude my safe use of Toradol.

This Release is a legally binding contract that is intended to provide a comprehensive release of liability. It supersedes any other agreements or representations, whether written or oral, regarding the subject matter. I further agree that no oral representations, statements or inducements apart from this written agreement have been made to me.

I agree that this Release shall be governed by California law. I further agree that all rights under Section 1542 of the California Civil Code are hereby expressly waived. That section reads as follows:

> **1542. Certain claims not affected by general release.** A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

I agree that any disputes regarding this Release will be resolved in San Diego. This Release is intended to be as broad and inclusive as permitted by the laws of the State of California. If any portion of it is held invalid, the balance shall continue in full legal force and effect.

I HAVE CAREFULLY READ THIS DOCUMENT AND FULLY UNDERSTAND ITS CONTENTS. I UNDERSTAND THAT BY SIGNING THIS CONTRACT, I AM COMPLETELY RELEASING THE RELEASED PARTIES FROM ANY AND ALL LIABILITY RELATING TO THE USE OF TORADOL.

I HAVE BEEN GIVEN AN OPPORTUNITY TO CONSULT WITH AND DISCUSS THE USE OF TORADOL WITH A HEALTH CARE PROFESSIONAL OF MY CHOOSING BEFORE SIGNING THIS RELEASE. I HAVE ALSO BEEN GIVEN AN OPPORTUNITY TO CONSULT WITH AN ATTORNEY(S) OF MY CHOOSING PRIOR TO SIGNING THIS RELEASE FROM LIABILITY. I CONCLUSIVELY AGREE THAT IN MAKING MY DECISION TO SIGN THIS RELEASE I HAVE NOT RELIED ON ANY REPRESENTATIONS MADE BY THE RELEASED PARTIES.

I HEREBY SIGN THIS RELEASE OF MY OWN FREE AND EXPRESS WILL.

_____ _____

Full Name (please print) Date

_____

Signature

10193403v.4

Sonya D. Winner (Bar No. 200348)
swinner@cov.com
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, California 94111-5356
Telephone: (415) 591-6000
Facsimile: (415) 591-6091

Allen Ruby (Bar No. 47109)
allen.ruby@skadden.com
Jack P. DiCanio (Bar No. 138782)
jack.dicanio@skadden.com
SKADDEN, ARPS, SLATE, MEAGHER, & FLOM LLP
525 University Avenue, Suite 1400
Palo Alto, CA 94301
Telephone: (650) 470-4660
Facsimile: (650) 798-6550
Attorneys for Defendants

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ETOPIA EVANS, *et al.*,

Plaintiffs,

v.

ARIZONA CARDINALS FOOTBALL CLUB, LLC, *et al.*,

Defendants.

Civil Case No.:3:16-CV-01030-WHA

NOTICE OF MOTION AND MOTION TO DISMISS AMENDED COMPLAINT

Date: January 19, 2017
Time: 8:00 a.m.
Dept: Courtroom 8
Judge: Honorable William Alsup

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NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 19, 2017, at 8:00 a.m., or as soon thereafter as available, in the courtroom of the Honorable William Alsup, located at 450 Golden Gate Avenue, Courtroom 8, 19th Floor, San Francisco, California 94102, Defendants Arizona Cardinals Football Club, Inc., *et al*., will and hereby do move for an order dismissing plaintiffs' Amended Complaint (Dkt. No. 136) with prejudice.

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the accompanying Declaration of Sonya D. Winner, the pleadings and papers on file in this action, any other such matters of which the Court may take judicial notice, the arguments of counsel, and any other matter that the Court may properly consider.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs' Amended Complaint (Dkt. No. 136) offers an extravagant theory, alleging in conclusory terms that the NFL clubs conspired to defraud their football player-employees about medications in furtherance of a common "policy" of hastening injured players back onto the field without regard to their physical well-being. Indeed, in the Amended Complaint some plaintiffs go so far as to assert that this alleged conspiracy extended to broad-based, agreed-upon violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). But plaintiffs fail to allege the *facts* required to support these claims, and the Amended Complaint should be dismissed.

As a threshold matter, the new RICO claim is, on its face, plainly barred by the statute of limitations. RICO permits claims only for an injury to "business or property." It does not permit claims for physical injuries; as a result, "latent" physical injuries of the kind that plaintiffs allege in support of their state-law claims are immaterial for RICO statute of limitations purposes. The Supreme Court has squarely held that the four-year limitations period for RICO claims begins running as soon as a plaintiff knows of an injury to his business or property, *regardless of whether he knows that the injury was caused by a RICO violation*. The "business" injury alleged by each plaintiff who asserts a RICO claim –

the ending of his playing career – occurred, and was unquestionably known to him, more than a decade before plaintiffs' complaint was filed.

Plaintiffs' claims fail across the board for the additional reason that they ignore the requirement of Rule 8 of the Federal Rules of Civil Procedure that claims be supported by "facts" and the requirement of Rule 9(b) that fraud be pled with particularity. For example, plaintiffs' claims of conspiracy are unsupported by allegations of fact that, if proved, would establish the existence of any actual *agreement*, as opposed to unilateral decisions by employees of individual clubs. The Supreme Court and Ninth Circuit have provided detailed guidance on the requirements for pleading a conspiracy; the Amended Complaint does not come close to satisfying those requirements.

On the merits, while the Amended Complaint is replete with conclusory allegations of "concealment," "omissions," and "misrepresentations," the thirteen plaintiffs identify not a single instance in which one of them claims to have accepted a specific medication *because of* an affirmative misrepresentation or the intentional nondisclosure of material information. Nor does any plaintiff identify any misrepresentation or concealment of material facts that caused harm to him.

Over a year and a half into this litigation, and even with the benefit of considerable discovery, plaintiffs are still unable to plead basic facts that should have been in their possession before this suit was brought. The amended complaint should be dismissed. And because plaintiffs have made it plain in discovery that they cannot cure the pleading defects identified here, such dismissal should be with prejudice.

II. ALLEGATIONS OF THE AMENDED COMPLAINT

Plaintiffs allege that each NFL club adhered to a "return to play practice or policy" under which injured players were under pressure to return to play as soon as possible. AC ¶ 3. Plaintiffs assert that club doctors and athletic trainers improperly administered medications in treating injured players in an effort to get them back on the field regardless of whether the return was medically appropriate.

Although much of the Amended Complaint focuses on allegations that team doctors misdiagnosed injuries and/or failed to satisfy the standard of care for treating them, *see, e.g.*, AC ¶¶ 236, 246, 249, plaintiffs do not assert causes of action for medical malpractice. Nor do plaintiffs assert claims for negligence more generally. This is no accident, as this Court has previously held that such

claims are preempted by Section 301 of the Labor Management Relations Act. *See Dent v. Nat'l Football League*, 2014 WL 7205048 (N.D. Cal. Dec. 17, 2014).

In an effort to avoid this Court's ruling in *Dent*, plaintiffs allege – generally and in conclusory terms – (a) that club doctors and athletic trainers made intentional misrepresentations concerning certain medications, (b) that club doctors and athletic trainers intentionally failed to disclose (or "omitted' or "concealed") information about potential "side effects" of these medications, and (c) that defendants violated the federal Controlled Substances Act and Food, Drug & Cosmetics Act in the procurement, management, administration, and storage of the medications. AC ¶¶ 105-14, 305.[1] In support of the new RICO claim, the Amended Complaint also alleges generally that the clubs engaged in mail and wire fraud, although not in connection with any communications with the plaintiffs. *Id.* ¶¶ 306-18.

Each of the thirteen plaintiffs played professional football for one or more NFL clubs.[2] Each alleges that doctors and athletic trainers at the clubs for which he played gave him medications to treat injuries or other conditions. *See, e.g.*, AC ¶ 114. Each alleges claims for intentional misrepresentation and/or concealment in connection with these medications. The specifics of what each plaintiff alleges – and, more notably, fails to allege – on this subject are addressed further in Part III.C below.

Each plaintiff alleges in conclusory fashion that he suffered various physical injuries and harms, although none alleges that any particular injury or harm is causally linked to any misrepresentation or omission (or other unlawful act) relating to any particular medication. *See* AC ¶¶ 224, 228, 230, 232, 240, 242, 247, 249, 251, 257, 260, 263, 265.

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[1] As the Court is aware, plaintiffs successfully argued that the claims in the original complaint were not preempted because, unlike in *Dent*, plaintiffs were asserting only intentional torts rather than negligence. *See* Dkt. No. 89 at 5-6. However, the version of the Amended Complaint that plaintiffs filed includes several paragraphs, copied from the *Dent* complaint, that refer to alleged "negligence." *See* AC ¶¶ 165-83. Those allegations would provide further grounds for dismissal here, and defendants reserve the right to challenge plaintiffs' claims on preemption grounds should the case be permitted to proceed.

[2] Plaintiff Etopia Evans sues solely in her capacity as Personal Representative for the estate of former player Charles Evans. Collective references to "plaintiffs" in the Amended Complaint are clearly intended to refer to him rather than to her, and this Motion adopts the same convention.

Some of the thirteen plaintiffs also offer allegations concerning the ending of their professional football careers. These newly added allegations are apparently intended to show injury to "business or property," a required element under RICO. *See* AC ¶ 325. Plaintiffs Eric King, Robert Massey, Troy Sadowski, Jeffrey Graham, Cedric Killings, and Reggie Walker do not allege injuries to business or property; nor do they assert RICO claims. *See* AC ¶ 9.

III. ARGUMENT

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted); *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although well-pleaded allegations, and reasonable inferences that may be drawn from those allegations, are accepted as true, "for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted).

Moreover, under Rule 9(b), a plaintiff alleging fraud "must state with particularity the circumstances" of the alleged fraudulent conduct. *United States v. United Healthcare Ins. Co.*, 832 F.3d 1084, 1101 (9th Cir. 2016) (citation omitted). And plaintiffs may not merely "lump multiple defendants together;" rather, they must "differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (citation omitted).

The Amended Complaint fails to satisfy these fundamental standards of pleading and should therefore be dismissed with prejudice.[3]

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[3] The arguments below address both new claims added in the Amended Complaint and claims held over from the original complaint with revised allegations. Such an amended complaint supersedes the original and is therefore not subject to Rule 12(g), which bars successive Rule 12(b)(6) motions on the *same* complaint. *See In re Sony Grand WEGA KDF–E A10/A20 Series Rear Projection HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1098 (S.D. Cal. 2010); *see also Cover v. Windsor Surry Co.*, 2016 WL 520991, at *4 (N.D. Cal. Feb. 10, 2016) (court has discretion to consider any issue raised under Rule 12(b)(6) on an amended complaint). Alternatively, to the extent it addresses claims that were asserted in the original complaint, this motion may be deemed one for judgment on the pleadings

(continued…)

A. Plaintiffs Have Failed to State a Claim on Which Relief May Be Granted Under RICO.

Seven of the thirteen plaintiffs assert a claim under RICO on behalf of themselves and a putative class. *See* AC ¶ 9. To establish a RICO claim, plaintiffs must establish that defendants (1) conducted (or conspired to conduct), (2) an enterprise, (3) through a pattern of racketeering activity consisting of two or more related "predicated acts" in violation of specified criminal laws, (4) with resulting injury to plaintiffs' "business or property." *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005). Plaintiffs' pleading of this claim is deficient in multiple respects; this motion addresses some of the most evident deficiencies, each of which is independently sufficient to warrant dismissal.

1. It Is Plain From the Face of the Complaint That Plaintiffs' RICO Claim Is Barred by the Statute of Limitations.

In denying defendants' motion to dismiss the original complaint based on the statute of limitations applicable to common-law claims, the Court pointed to plaintiffs' allegation that they suffered from "latent" physical injuries of which they had only recently become aware. Dkt. No. 89 at 7. No such allegation can save plaintiffs' new RICO claim from the statute of limitations, as the nature of the injury that must be pled for a RICO claim – and the rules for applying the statute of limitations to such injuries – are different.

A RICO claim requires a showing of injury to the plaintiff's "business or property." 18 U.S.C. § 1964(c). Personal injuries, such as physical injuries, are not compensable under RICO. *Oscar v. Univ. Students Co-Op. Ass'n*, 965 F.2d 783, 785-86 (9th Cir. 1992) (en banc); *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990); *see also Grogan v. Platt*, 835 F.2d 844, 846-47 (11th Cir. 1988). In the Amended Complaint, the plaintiffs who assert a RICO claim allege injuries to "business or property" based on the allegedly premature ending of their professional football careers. Specifically:

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under Rule 12(c), which is not subject to the Rule 12(g) limitation and is "functionally identical" to a motion under Rule 12(b)(6). *See* F4,5d. R. Civ. P. 12(h); *Cafasso, United States ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054-55 & n.4 (9th Cir. 2011); *Cover*, 2016 WL 520991, at *4.

- **Chris Goode**, who played for the Indianapolis Colts until 1993 (AC ¶¶ 23-24), "believes that the Colts were unwilling to re-sign him out of fear of his inability to play the following season" after he suffered a neck injury. AC ¶ 233. He alleges that absent the "pressure[] to return to play" following the neck injury, his career would not have ended in 1993. *Id.*
- **Darryl Ashmore** played for the Los Angeles/St. Louis Rams, Washington Redskins, and Oakland Raiders. AC ¶ 25. He alleges that while playing for the Rams, he suffered a "career-ending neck injury" but was kept on the field "through [unidentified] Medications and he was not told of their [unidentified] side effects." *Id.* ¶ 239. Ashmore's last season was in 2001. *Id.*
- **Jerry Wunsch** played for the Tampa Bay Buccaneers and Seattle Seahawks. AC ¶ 27. He alleges that he suffered ankle injuries and that, after the last one, a doctor told him his ankles were so damaged that he could not return to play. He was cut from the team shortly thereafter. AC ¶ 247. His career ended in 2004. *Id.* ¶ 27.
- **Alphonso Carreker** played for the Green Bay Packers and Denver Broncos. AC ¶ 29. He was cut by the Broncos in 1991 because, he "believes," of an "injury to his back that was not given sufficient time to heal. No other team signed him, thus ending his career." AC ¶ 243.
- **Steve Lofton** played for the Arizona Cardinals, Carolina Panthers, and New England Patriots. AC ¶ 31. He alleges generally that "if the major injuries he suffered had been given time to heal, and had not been masked by painkillers, he would have had a longer playing career." *Id.* ¶ 252. His career ended in 1998. *Id.* ¶ 31.
- **Duriel Harris** played for the Miami Dolphins, Baltimore Ravens (then operating as the original Cleveland Browns club),[4] and Dallas Cowboys. AC ¶ 33. Harris alleges a heart condition that was diagnosed when he was with the Cowboys. *Id.* ¶ 257. He alleges that because of this condition, for which the Cowboys required him to sign a waiver, he was

[4] The original Cleveland Browns club moved to Baltimore in 1996 and was replaced in Cleveland by a different club that adopted the Browns name. Harris played for the original club briefly in 1984.

"afraid to exert himself maximally for fear he would have a heart attack," and that this "[was] ultimately . . . a reason his career ended," along with an ankle injury that "was not given sufficient time to heal." *Id.* ¶¶ 257-58. His career ended in 1984. *Id.* ¶ 258.

Plaintiff Etopia Evans, Personal Representative of the estate of Charles Evans, AC ¶ 15, also asserts a RICO claim, although she alleges no injury to business or property, only physical injuries to her late husband. *See Id.* ¶¶ 9, 224. Charles Evans, who played for the Minnesota Vikings and Baltimore Ravens, retired in 2000 and died in 2008. *Id.* ¶¶ 15, 224.

While it is doubtful that the premature ending of a professional football career due to physical injuries constitutes injury to "business or property" within the meaning of RICO, *see Grogan*, 835 F.2d at 847 (financial losses that are merely derivative of personal injuries do not constitute injury to "business or property"), the Court need not reach that question, as the career-ending events about which these plaintiffs complain all occurred a decade or more before this case was filed in 2015. The most recent season in which any of these plaintiffs was employed by an NFL club was 2004.

The statute of limitations under RICO is four years. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987). The Supreme Court has held that the limitations period begins to run as soon as a plaintiff knows of his injury, regardless of whether he knows that the injury was caused by a RICO violation. *Rotella v. Wood*, 528 U.S. 549, 554 (2000). Once a plaintiff knows of his injury, the statute affords him four years – and no more – to investigate and bring his claim, even if it is difficult to ascertain the cause of the injury due to circumstances such as fraud. *Id.* at 556-57, 560; *see also Pincay v. Andrews*, 238 F.3d 1106, 1109 (9th Cir. 2001); *Crown Chevrolet v. Gen. Motors, LLC*, 637 F. App'x 446, 446 (9th Cir. 2016); *Hunter v. Gates*, 68 F. App'x 69, 70 (9th Cir. 2003).

Each of the RICO plaintiffs unquestionably knew when his professional football career ended. That is the dispositive fact for statute of limitations purposes. It is immaterial whether any plaintiff knew or had reason to know then that his career ended because of "racketeering activity." *Rotella*, 528 U.S. at 556-57. All of the RICO claims are accordingly barred. *See Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980) (statute of limitations may be addressed on a motion to dismiss if running of the statute is apparent from the face of the complaint).

2. Plaintiffs Have Failed to Allege that the Claimed Injury to Their Business or Property Was Proximately Caused by Racketeering Activity.

Apart from Evans (who alleges no business injury at all), each of the RICO plaintiffs attributes the ending of his career to a physical injury suffered while playing football. None identifies predicate acts of racketeering – whether relating to medications or otherwise – as the proximate cause of his career ending.

To support a claim under RICO, a plaintiff's business injury must have been proximately caused by the "racketeering" conduct that establishes the RICO violation. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68 (1992); *see* 18 U.S.C. § 1964(c). A RICO claim may not be based on injury caused by *other* conduct of the defendants. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-97 (1985) ("[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct") (citations omitted). Moreover, "speculative 'but for' causation is insufficient to state a RICO claim. RICO liability requires a direct and proximate causal relationship between the asserted injury and the alleged misconduct." *Oki Semiconductor Co. v. Wells Fargo Bank, Nat'l Ass'n*, 298 F.3d 768, 774 (9th Cir. 2002); *see also Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006); *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1147-49 (9th Cir. 2008); *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 980-83 (9th Cir. 2008).[5]

No RICO violation can arise from misdiagnosis of injury, from negligent medical treatment, or from oral misrepresentations or omissions concerning medications. Rather, the RICO statute identifies a specific list of activities that constitute the predicate acts needed to establish a RICO claim. 18 U.S.C.

[5] Causation stemming from alleged fraud cannot be established absent facts indicating that the plaintiff would have acted differently if faced with different information. *See Assoc. of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 702 (9th Cir. 2001) (RICO claim by health-care providers challenging marketing of tobacco was "entirely speculative" because, *inter alia*, the plaintiffs' damages would require proof "of how smokers themselves would have changed their behavior in the absence of defendants' wrongdoing") (citing *Oregon Laborers-Employers Health & Welfare Trust Fun v. Philip Morris Inc.*, 185 F.3d 957, 965 (9th Cir. 1999)); *see also In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 246 (3d Cir. 2012) (finding insufficient pleading of facts establishing that drug company's fraudulent marketing practices caused doctors to write the prescriptions for which the plaintiff paid).

§ 1961(1). The RICO plaintiffs identify three categorical violations from this list: mail fraud, wire fraud, and violations of the Controlled Substances Act. *See* AC ¶¶ 299-318. None of these alleged violations is – or could be – cited as a proximate cause of these plaintiffs' business injuries.

Plaintiffs' allegations concerning mail and wire fraud are wholly conclusory; they contain no particularized allegations as required under Rule 9(b), and there is not even a general allegation that any plaintiff was defrauded through use of the mails or telecommunications. To the contrary, to the extent there are any allegations about misrepresentations and/or omissions to these plaintiffs, all are in the context of their face-to-face interactions with club doctors and athletic trainers. *See Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (finding fraudulent RICO acts were insufficiently pled under Rule 9(b) when "the allegations describing the operative events failed to mention any use of the mails or telephones").

Nor do any of these plaintiffs identify any injury proximately caused by an alleged violation of the Controlled Substances Act.[6] Regardless of whether any of the conduct generally alleged might technically have violated that statute – and defendants do not agree with plaintiffs' assertion of what the CSA requires – none of *that* conduct is alleged to have caused the end of any plaintiff's football career. For example, Paragraph 303 offers a list of separate, unrelated occasions when doctors or trainers for 24 of the clubs allegedly provided medications at away games or during travel. Plaintiffs appear to be asserting that provision of medications in those locations (as opposed to at home) violated the CSA. Even assuming, *arguendo*, that this is a correct statement of the law, none of these events is alleged to have caused injury to any of the plaintiffs' business or property.

Even if it were a technical violation of the CSA for a trainer to have given plaintiff Carreker a Vicodin pill in a visiting team locker room after a game in 1989, for example, *see id*, there is no suggestion that Carreker (who played for two more years) suffered any injury – much less injury to his

[6] Violations of the Food, Drug and Cosmetics Act are not "predicate acts" under RICO and cannot provide a basis for a RICO claim. Some violations of the Controlled Substances Act are RICO predicates. But not all "medications" discussed prominently in the Amended Complaint are subject to the CSA. Toradol, Cortisone and Hylagan, for example, are not alleged to be (and are not) Controlled Substances. *See* 21 U.S.C. § 812; 21 C.F.R. Part 1308.

business or property – as a result. The Amended Complaint does not allege that Vicodin was an inappropriate treatment for Carreker on that occasion; nor does it allege that a physician licensed to dispense Vicodin in that location would not have given him the same medication. Nor is any proximate nexus alleged between any injury *to these plaintiffs* and, for example, such conduct as "[o]ne registrant with the DEA using the script pad of another registrant" (AC ¶ 305) or "bulk purchases" of pharmaceuticals (*id.* ¶ 315). Regardless of whether such conduct was or was not lawful, none of it is alleged to be the proximate cause of plaintiffs' alleged business injuries.

The Supreme Court has made clear that a RICO plaintiff may not simply allege that a defendant (a) committed a RICO violation and (b) engaged in *other* conduct that injured him. *Anza*, 547 U.S. at 458; *Sedima*, 473 U.S. at 497. Plaintiffs present a complex and attenuated causal chain for their alleged business injuries: intense pressure to participate in games caused them to accept medications, which in turn made it easier for them to acquiesce to the pressure to play, which put them in a position in which they suffered further physical injuries in games, which in turn ultimately ended their careers. Nowhere in this chain is there any alleged proximate link between the alleged "business injury" – loss of a plaintiff's career – and any specific *racketeering* acts by any defendant. Accordingly, none of these plaintiffs can properly allege a cause of action under RICO.

3. Plaintiffs Have Not Plausibly Alleged a Conspiracy to Violate RICO.

The Amended Complaint alleges violations of RICO under 18 U.S.C. §§ 1962(c) (conduct of an enterprise through a pattern of racketeering activity) and 1962(d) (conspiracy to violate Section 1962 (c)). As discussed below, only the latter – the allegation of a RICO conspiracy – could even potentially establish claims against all of the defendants here. But plaintiffs' pleading falls well short of what is required to plead an actionable conspiracy.

In *Twombly*, the Supreme Court confirmed that, even under the notice pleading standard of Rule 8, a complaint asserting a claim based on conspiracy must plead *facts* that plausibly suggest a genuine conspiracy, as opposed to mere parallel conduct. 550 U.S. at 577. To this end,

> an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of

> parallel conduct are set out in order to make a § 1 [conspiracy] claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

Id. at 556-57.

Since *Twombly*, the Ninth Circuit has applied these principles on multiple occasions. For example, in *Kendall v. Visa U.S.A., Inc*., 518 F.3d 1042 (9th Cir. 2008), the court described in detail the types of nonconclusory facts that are required to plead a conspiracy:

> Appellants do not allege any facts to support their theory that the Banks conspired or agreed with each other or with the Consortiums to restrain trade. Although appellants allege the Banks "knowingly, intentionally and actively participated in an individual capacity in the alleged scheme" to fix the interchange fee or the merchant discount fee, this allegation is nothing more than a conclusory statement. There are no facts alleged to support such a conclusion…. [T]he complaint does not answer the basic questions: who, did what, to whom (or with whom), where, and when?"

Id. at 1048. The court cautioned that "[a]llegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient . . . ." *Id*. at 1049.

More recently, in *In re Musical Instruments & Equipment Antitrust Litigation*, 798 F.3d 1186, 1193 (9th Cir. 2015), the Ninth Circuit again confirmed that allegations of parallel conduct must plead *nonconclusory* facts to establish an agreement. Plaintiffs must plead "something more," "some further factual enhancement," a "further circumstance pointing toward a meeting of the minds" of the alleged conspirators. *Id*. at 1193 (quoting *Twombly*, 550 U.S. at 557). "Recognizing that parallel conduct may arise on account of independent business decisions rather than an illegal agreement, *Twombly* requires that when [a complaint rests on] allegations of parallel conduct . . . plaintiffs must plead enough nonconclusory facts to place that parallel conduct 'in a context that raises a suggestion of a preceding agreement.'" *Id*. at 1193-94 (citation omitted); *see also Vertkin v. Wells Fargo Home Mortg*., 2011 WL 175518, at *4 (N.D. Cal. Jan. 18, 2011) (rejecting conspiracy claim based on allegation of parallel conduct), *aff'd*, 491 F. App'x 824 (9th Cir. 2012) .

These principles apply with full force to a RICO conspiracy claim. For example, in *Mazur v. eBay Inc*., 2008 WL 2951351 (N.D. Cal. July 25, 2008), the court held that alleging the mere existence

of common motivation to make money does not sufficiently plead a RICO conspiracy claim, especially given that "[t]he financial motivation of each [alleged conspirator] demonstrates that each could have independently engaged in [the challenged] activity without the existence of a conspiracy . . . ." *Id.* at *6.

The Amended Complaint asserts in conclusory terms that defendants participated in a common "policy" of returning players to the field with insufficient regard for their health. And it alleges that some clubs *individually* acted in a manner that would be consistent with such a policy. *See, e.g.*, AC ¶¶ 226-27. But the complaint presents no facts demonstrating any *agreement* among the clubs to do so.

The alleged motivation for the claimed "policy" – a desire to maximize the quality of the product by keeping the best performers on the field (AC ¶ 3) – would exist in equal measure with or without any agreement.[7] Indeed, if anything, the alleged conduct by the clubs, viewed in the competitive context of the NFL, is more consistent with the *absence* of any such agreement. A club has a strong unilateral motivation to field its best and most effective players so as to maximize its chances of winning each Sunday – and a *disincentive* to see the other team do the same.

The Amended Complaint is bereft of factual allegations demonstrating any actual *agreement* by the clubs. To be sure, it does refer to committees that have sought to promote player health and safety and offered recommendations concerning the safe use and handling of medications.[8] Far from suggesting any conspiracy to commit the abuses alleged in the complaint, these allegations, if anything, demonstrate efforts by the NFL, its member clubs, and club doctors to *prevent* such abuses. For example, the Amended Complaint describes a task force of club physicians that studied the health

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[7] For purposes of this motion, defendants accept *arguendo* plaintiffs' irrational assertion that an NFL club would be motivated to expose its players to unreasonable health risks or injury in order to keep them on the field. In fact, it is far from plausible that any NFL club would ever – much less routinely – take that kind of risk with players in whom it has invested hundreds of thousands or even millions of dollars and on whom the clubs' competitive success may depend. It is even more implausible to suggest (as plaintiffs do) that every single doctor and trainer associated with every NFL club for the past 50 years has routinely and unquestioningly adhered to such a policy.

[8] As the Court is aware, the clubs have jointly addressed these issues in considerable detail in collective bargaining with the players' union, which presumably is motivated to protect its members rather than expose them to unnecessary risk. *See Dent*, 2014 WL 7205048, at * 4-6. Plaintiffs do not – and clearly cannot – challenge this collective bargaining activity as an unlawful "conspiracy."

effects of Toradol and offered recommendations on limiting its use. *Id.* ¶¶ 210-20. There is no suggestion that this task force sought to *mandate* how (or even if) the medicine would be used. To the contrary, the Amended Complaint criticizes the task force for emphasizing that "'each team physician is ultimately free to practice medicine as he or she feels is in the best interest of the patient.'" *Id.* ¶ 220 (quotation marks in original).[9]

A RICO conspiracy "requires the assent of *each* defendant who is charged." *Baumer v. Pachl*, 8 F.3d 1341, 1346 (9th Cir. 1993) (emphasis added). "[A] defendant who did not agree to the commission of crimes constituting a pattern of racketeering activity is not in violation of section 1962(d), even though he is somehow affiliated with a RICO enterprise, and neither is the defendant who agrees to the commission of two criminal acts but does not consent to the involvement of an enterprise." *Id.* (citations omitted). Here, there are simply no factual allegations that plausibly suggest that any club defendant, much less every club defendant, agreed to participate in this hypothetical conspiracy.

4. Given the Absence of a Valid Conspiracy Claim, Plaintiffs Have Stated No RICO Claims Against the Majority of the Club Defendants.

The six plaintiffs who allege injury to business or property collectively played for only 14 of the 32 club defendants – and only six of those club defendants are alleged to have been associated with events that ended those plaintiffs' careers. There is no allegation that *any* plaintiff received any medications, or was otherwise injured, by or at the direction of any club other than the one he was playing for at the time his career ended.

Accordingly, in light of plaintiffs' failure adequately to plead a RICO conspiracy, there is no factual basis in the complaint to support plaintiffs' RICO claim against *at least* 25 of the 32 club defendants – those for whom the plaintiffs who assert business injury never played and those for whom

[9] Paragraph 125 alleges "on information and belief" that a committee called the "NFL Drug Advisory Committee" was established "to oversee the administration of controlled substances and prescription drugs to players." Nowhere is it alleged that this committee had the purpose or function of directing that players be improperly medicated or that the clubs engage in any unlawful activity. Nor is it alleged that this committee had any role in directing what players were or were not told about the medications administered to them.

they played only at other points in their careers. At a minimum, the RICO claim should accordingly be dismissed as against those 25 defendants.[10]

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For the foregoing reasons, plaintiffs' new RICO claim should be dismissed. And because the RICO claim is the *only* claim in the Amended Complaint that plaintiffs seek to assert on behalf of a class,[11] plaintiffs' class action allegations should also be dismissed or stricken.

B. Plaintiffs' Civil Conspiracy Claim Fails As a Matter of Law.

Plaintiffs' civil conspiracy claim should be dismissed on multiple grounds.

First, as discussed at pp. 10-13 above, plaintiffs have "not provide[d] sufficient facts to satisfy even the first element of civil conspiracy," i.e., that a conspiracy was formed. *Davenport v. Litton Loan Servicing, LP*, 725 F. Supp. 2d 862, 881 (N.D. Cal. 2010) (conspiracy claim dismissed where plaintiff merely "*conclude[d]* the defendants agreed to hoodwink her" (emphasis in original)); *see Cisco Sys., Inc. v. STMicroelectronics, Inc.*, 77 F. Supp. 3d 887, 894 (N.D. Cal. 2014) (plaintiff provided only "conclusory allegations insufficient to support a pleading of conspiracy"). Plaintiffs have pled no facts establishing that there was any agreement among the clubs to adhere to a "return to play policy" based on improper medication of players. That alone dooms their conspiracy claim.

Second, even if an agreement were shown, it would still be insufficient to support a civil conspiracy claim. "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on

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[10] The club defendants that never employed any of the RICO plaintiffs who allege injury to business or property are the Atlanta Falcons, Buffalo Bills, Chicago Bears, Cincinnati Bengals, [current] Cleveland Browns, Detroit Lions, Houston Texans, Jacksonville Jaguars, Kansas City Chiefs, Minnesota Vikings, New Orleans Saints, New York Giants, New York Jets, Philadelphia Eagles, Pittsburgh Steelers, San Diego Chargers, San Francisco 49ers, and Tennessee Titans. The club defendants for whom these plaintiffs played at some point but to whom the complaint does not attribute their career-ending injuries (either directly or by inference) are the Arizona Cardinals, Baltimore Ravens, Carolina Panthers, Green Bay Packers, Miami Dolphins, Oakland Raiders, Tampa Bay Buccaneers, and Washington Redskins.

[11] Paragraph 9 explicitly states that only the RICO claim is asserted on behalf of a proposed class. The same distinction is made in the claim headings. *Compare* AC at 74 (stating that the RICO claim is asserted by certain named plaintiffs "and the Nationwide Class") *with id.* at 89 (stating that the intentional misrepresentation claim is asserted by "all plaintiffs except Reggie Walker").

persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." *Cisco Systems*, 77 F. Supp. 3d at 894.[12] Thus, "a claim for civil conspiracy is sustainable only after an underlying tort claim has been established." *Brian Jonestown Massacre v. Davies*, 2014 WL 4076549, at *5 (N.D. Cal. Aug. 18, 2014) (citation omitted).

A civil conspiracy claim *cannot* be asserted based on alleged violations of the Controlled Substances Act or the Food, Drug & Cosmetic Act. There are no private rights of action under those statutes. *See Buckman Co. v. Plaintiff's Legal Comm.*, 531 U.S. 341, 349 n.4 (2001) ("[t]he FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance . . ."); *United States v. Real Prop. & Improvements Located at 1840 Embarcadero, Oakland, Cal.*, 932 F. Supp. 2d 1064, 1072 (N.D. Cal. 2013) ("courts have consistently held that there is no private right of action under the CSA"); *accord Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1290 (D. Colo. 2016). Accordingly, alleged violations of those statutes cannot support a civil conspiracy claim. *See In re Orthopedic Bone Screw Products Liability Litigation*, 193 F.3d at 789-90 (dismissing civil conspiracy claim based on the FDCA); *Placencia v. I-Flow Corp.*, 2011 WL 1361562, at *3 (D. Ariz. Apr. 11, 2011) (citing *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919, 924 (9th Cir. 2010)).

Thus, in order to pursue a civil conspiracy claim here, plaintiffs must plead an independently actionable tort, separate and apart from alleged violations of these statutes. The only such torts pled in the Amended Complaint are intentional misrepresentation and concealment. As discussed in the next section below, those claims are not pled with the particularity required under Rule 9(b) and should be dismissed on that ground. The civil conspiracy claim necessarily fails for the same reason, as plaintiffs cannot avoid the heightened pleading requirements of Rule 9(b) by repackaging their fraud claim as one for "civil conspiracy." *See Cisco Systems*, 77 F. Supp. 3d at 894 (applying Rule 9(b) standard to civil conspiracy allegation based on a claim of intentional misrepresentation); *see also Borsellino v. Goldman*

[12] Although differing in other important respects, the state laws on civil conspiracy are consistent on this point. *See In re Orthopedic Bone Screw Prods. Liab. Litig.*, 193 F.3d 781, 789 & n.7 (3d. Cir. 1999) ("we are unaware of any jurisdiction that recognizes civil conspiracy as a cause of action requiring no separate tortious conduct").

Sachs Grp., Inc., 477 F.3d 502, 509 (7th Cir. 2007) (applying Rule 9(b) to civil conspiracy allegations premised on a course of fraudulent conduct); *Brian Jonestown Massacre*, 2014 WL 4076549, at *5 (dismissing conspiracy claim because allegations of putative underlying tort were legally infirm).

C. Plaintiffs' Intentional Misrepresentation and New "Concealment" Claims Are Not Pled With the Requisite Particularity.

Intentional misrepresentation and concealment are both fraud claims. *Stewart v. Wyoming Cattle-Ranche Co.*, 128 U.S. 383, 388 (1888); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009). Each requires a showing, among other elements, that the defendant deceived the plaintiff, either through a false representation about a material fact or by concealing a material fact; that the plaintiff relied on the representation or concealment; and that the representation or concealment was a proximate cause of injury to the plaintiff. *See, e.g., Tapia v. Davol, Inc.*, 116 F. Supp. 3d 1149, 1165 (S.D. Cal. 2015) (elements of fraudulent misrepresentation and concealment claims).[13]

Because these claims sound in fraud, they are subject to the requirement of Rule 9(b) that the facts surrounding the fraud be alleged with particularity. Fed. R. Civ. P. 9(b). Rule 9(b) requires that "the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Kearns*, 567 F.3d at 1124 (citations omitted).

To satisfy Rule 9(b), "averments of fraud must be accompanied by the 'who, what, when, where, and how' of the misconduct charged." *Id.* (citation omitted). The "complaint must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity." *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993). The allegations must also state facts that

[13] Although state laws governing the tort of intentional misrepresentation vary significantly, they are generally consistent in requiring at least these elements. *See, e.g., Eternity Glob. Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 186 (2d Cir. 2004); *Arthur v. Medtronic, Inc.*, 123 F. Supp. 3d 1145, 1149 (E.D. Mo. 2015); *Harris Cty. Texas v. MERSCORP Inc.*, 791 F.3d 545, 558 (5th Cir. 2015). State laws governing concealment also vary, but similarly require at least these elements. *See, e.g., Protica, Inc. v. iSatori Techs., LLC*, 2012 WL 1071223, at *4 (E.D. Pa. Mar. 30, 2012); *Bourgeois v. Live Nation Entm't, Inc.*, 3 F. Supp. 3d 423, 459 (D. Md. 2014); *First Hill Partners, LLC v. BlueCrest Capital Mgmt. Ltd.*, 52 F. Supp. 3d 625, 637 (S.D.N.Y. 2014).

establish the plaintiff's reliance on the misrepresentation or concealment. *See, e.g.*, *Arroyo v. Chattem, Inc.*, 926 F. Supp. 2d 1070, 1078 (N.D. Cal. 2012) (dismissing complaint that failed to allege circumstances surrounding the plaintiff's reliance on alleged affirmative misrepresentations and omissions).

Plaintiffs allege in *conclusory* terms that defendants "continuously and systematically made intentional misrepresentations to Class Members . . . about the Medications they provided." AC ¶ 328. Repeating near-verbatim boilerplate language more than two dozen times – once for each plaintiff's tenure with each club for which he played – the Amended Complaint then asserts in conclusory fashion that team doctors and athletic trainers "failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications." *Id.* ¶ 114. The gist of this general allegation is sometimes repeated elsewhere, *see, e.g.*, *id.* ¶ 241, but plaintiffs never provide anything close to the "who, what, when, where, and how" of any specific intentional misrepresentation or concealment; nor do they allege reliance on any such misrepresentations or concealment or other specific facts demonstrating causation of injury.

No particularized allegations of misrepresentations. No plaintiff identifies with particularity any instance when a specific medication was given to him accompanied by an affirmative material misrepresentation. *See, e,g.*, *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 1001 (N.D. Cal. 2009) (dismissing complaint when plaintiff "baldly" asserted that defendant "was deceptive" but did not "plead with particularity how and on what occasion this representation was made"); *De La Paz v. Bayer Healthcare LLC*, 159 F. Supp. 3d 1085, 1099 (N.D. Cal. 2016) (dismissing fraud claim that included only "bare descriptions" of alleged misrepresentations). The closest thing to a partial exception is plaintiff Sadowski's assertion that "he was told by a number of trainers that Toradol was not damaging to his long term health." AC ¶ 229. But Sadowski does not identify who said this or when. Nor does Sadowski allege (a) that whenever these statements were made (he played during the 1990s), the unidentified persons who made them knew that the statements were false, or (b) that absent the statements he would have chosen to decline the medication. *See Davies v. Broadcom Corp.*, 130 F.

Supp. 3d 1343 (C.D. Cal. 2015) (vague allegations of misrepresentations occurring in "in or about 2012" and "in or about March 2014" did not meet Rule 9(b) standard).[14]

No particularized allegations of concealment. The concealment claim suffers from the same defect: Every plaintiff offers general assertions about omissions, including failure to disclose "side effects," but no plaintiff alleges an instance when he was given a specific medication with known side effects, the risks of which were then known to the person who gave him the medication but were not disclosed to him, and which subsequently caused that plaintiff injury. *See, e.g.*, *Marolda*, 672 F. Supp. 2d at 1002 (dismissing concealment claim for failure to "plead the circumstances of omission with specificity").[15]

No allegations of reliance. No plaintiff offers *any* allegation of reliance or causation to tie any misrepresentation or omission to any injury he suffered. *See Kearns*, 567 F.3d at 1126 (plaintiff failed to allege, *inter alia*, what representations he relied on in making his decision); *Andren v. Alere, Inc.*, --- F. Supp. 3d ---, 2016 WL 4761806, at *6 (S.D. Cal. Sept. 13, 2016) (plaintiffs who did not allege that they ever relied on misrepresentations could not "link their injuries" to those misrepresentations). Similarly, no instance is identified when the disclosure of different or additional information then known to the person who provided the medication would have caused that plaintiff to choose to decline it. *See*, *e.g.*, *Tapia v. Davol, Inc.*, 116 F. Supp. 3d 1149, 1164 (S.D. Cal. 2015) (plaintiff failed "to assert facts as to causation alleging that *his own* prescribing physician would not have used the device had Defendants not concealed these facts").

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[14] Sadowski also fails to allege that he was injured by any "side effects" from Toradol that could and should have been disclosed at that time. Although the point is germane only to a possible grant of leave to amend, Sadowski has acknowledged in a verified interrogatory response that "no Person has ever told him that he was injured or harmed by his consumption of Medications." *See* Declaration of Sonya Winner ("Winner Dec.") Ex. 4 at 4. Other plaintiffs have made similar concessions in discovery. *See* pp. 22 below.

[15] Indeed, other allegations belie the conclusory assertion of omission. For example, plaintiff Walker – who played from 2009 until 2014 – claims no one ever warned him about the side effects of Toradol. AC ¶¶ 39, 264. But the Amended Complaint simultaneously alleges that defendants "uniform[ly]" required every player to sign a Toradol waiver beginning in 2010 and even attaches the waiver document, which discusses Toradol's side effects and risks in detail. AC ¶ 121 & Ex. A.

If anything, plaintiffs' allegations defeat any inference of reliance. The principal theme of the Amended Complaint is that plaintiffs accepted medications because they felt extreme pressure to return to play as soon as possible for fear of losing their jobs. *See, e.g.*, AC ¶¶ 262 (alleging that plaintiff Killings took medications to play because "[h]e wanted to keep his job"), 255 (alleging that plaintiff Harris agreed to accept an injection that would enable him to play because "he was afraid he would be cut if he objected"). Plaintiffs identify not a single instance in which any of them would have declined to take a medication – in the face of what they allege to be overwhelming pressure to return to play – if knowingly "omitted" information had been communicated.

A close examination of each plaintiff's individual allegations confirms the glaring gaps in the pleading of these claims.[16] The allegations of plaintiff Jerry Wunsch are typical – indeed, more detailed than most. Wunsch, who played for the Tampa Bay Buccaneers and Seattle Seahawks (AC ¶ 27), offers the same boilerplate allegation as other plaintiffs concerning medications provided to him by those clubs' doctors and athletic trainers. *Id.* ¶ 114. But like the other plaintiffs, he offers no particularized allegations about any specific misrepresentation or omission. His only allegations about specific incidents are as follows:

- Wunsch alleges that "at one point" he was told that a shot of Hylagan would "lubricate his gears" because "it was bone on bone in his ankle." AC ¶ 245. He does not allege that this statement was false or misleading, but he claims he was not told about "side effects." He does not allege who gave him the injection (or even by which club he was then employed); he does not identify the side effects to which his allegations refer; he does not allege that he suffered any such side effects; and he does not he identify any specific omitted information that was material and would have led him to decline the injection.
- Wunsch alleges that before a game in November 2003, the Seahawks' coach questioned him about an injury and then asked the team trainer "what can we do to help Mr. Wunsch play

[16] Should the Court wish to examine in detail the allegations about any given plaintiff, Exhibit A to this motion lists all paragraphs of the Amended Complaint that specifically mention each named plaintiff.

today." AC ¶ 246. He alleges that the team doctor subsequently gave him medications. *Id.* He does not identify any misrepresentations about these medications or omissions of information that would have caused him to decline them.

- Wunsch alleges that an unidentified doctor for an unidentified club once told him that if he had surgery for a torn labrum his career would be over. The doctor allegedly recommended that he instead manage the problem with medications, and Wunsch elected to follow this advice. Id. ¶ 247. He does not allege any misrepresentations or omissions concerning this episode, or that he relied on any such misrepresentations or omissions.
- Wunsch alleges that "[i]n one instance . . . before a game against the Baltimore Ravens" he "received a 1500 milligram dosage of Vicodin as well as Tylenol-Codeine #3." AC ¶ 244. He also alleges that in November 2003 he was given an Ambien the night before an away game in Baltimore and that in December 2000 he was given "Vicodin or Percocet" on a flight returning from Green Bay. *Id.* ¶ 303. He alleges no misrepresentations or omissions concerning these episodes; nor does he allege that they caused him harm or that receiving additional information about those medications would have caused him to decline them.

The allegations of Eric King, who played for the Buffalo Bills, Tennessee Titans, and Detroit Lions, are similarly deficient. He uses the same boilerplate language as the other plaintiffs to allege generally that doctors and athletic trainers at each of those three clubs administered various medications to him without adequate warnings. AC ¶ 114. King further alleges that he

> received hundreds of pills from trainers and injections from doctors[,] … including Toradol, Celebrex, Percocet and OxyContin. The trainers frequently didn't tell him the name of the drug, just that he should take it to numb the pain and play. The trainers also game him Ambien for sleeping before games. The trainers usually gave him the pills in an envelope, mostly blank but occasionally with his name. He also received injections of Toradol by club doctors before several games. … He was never informed of the possible side effects of using these Medications.

Id. ¶ 248. He also alleges that in November 2008, he was given Vicodin at an away game. *Id.* ¶ 303. No information is offered about what was said (and not said) on that occasion. *Id.*

Even accepting all of these allegations as true, they offer nothing to state, or even to support an inference, that any particular information that would have been *material* to King's decision to accept any particular medication was misrepresented to or concealed from him. There is no allegation that King would have chosen not to take the medications if provided with the name of the drug, warnings about particular known "side effects," or any other allegedly omitted information.

These failures of pleading are not trivial. Plaintiffs' claims of misrepresentation and concealment rest largely on allegations about failure to disclose "side effects." But a mere general allegation of failure to disclose "side effects" deprives defendants of the ability to evaluate, for example, what the alleged "side effects" were, whether the risks these "side effects" posed were trivial or severe, and whether they would even have been known at the time to the person who made the communication. It also precludes any evaluation of whether disclosure of those "side effects" would have been reasonably expected to discourage (and would in fact have discouraged) the plaintiff from accepting the medication, as well as any analysis of whether the plaintiff was injured by those side effects.

Plaintiffs' failure to plead proximate cause with respect to their vague allegations about "side effects" is particularly striking. For example, the *only* injury of which King complains is the "constant pain" that lingers from the injuries he incurred playing football. AC. ¶ 249. He does not attribute his current pain to "side effects" from medications; to the contrary, the only allegation King offers about causation is that "[t]he same left forearm and shoulder and back that were 'fixed' by Club doctors bring pain to Mr. King's daily life." *Id*. Generalized implications of medical malpractice fall far short of establishing that a plaintiff suffered injury ***because of intentional and knowing misrepresentations or intentional concealment of material information about medications.***[17] The intentional misrepresentation and concealment claims should be dismissed.

[17] Other plaintiffs similarly complain about injuries that have no apparent nexus to any alleged intentional misrepresentation or concealment. For example, plaintiff Ashmore alleges that a Raiders team doctor once misdiagnosed a broken wrist as a sprain and treated it accordingly; he received a cast after the break was discovered and continued to play with it. AC ¶ 236. He does not allege that the team doctor knowingly misrepresented or concealed anything to him about this injury, much less about any medications he was provided for it.

D. The Complaint Should Be Dismissed With Prejudice.

The Court should dismiss the Amended Complaint without leave to amend. At a minimum, the RICO claim should be dismissed with prejudice, as there are no facts plaintiffs could allege in another amendment that would avoid the statute of limitations bar to that claim.

The remainder of the complaint should be dismissed with prejudice as well. The Amended Complaint was filed more than 17 months into this case, on the last day authorized by the Court's Case Management Order. *See* Dkt. No. 90. Any subsequent amendment would require a showing of good cause – which would include a showing of inability to plead the requisite facts in a timely manner. *See AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 952 (9th Cir. 2006). It is a plaintiff's responsibility to "ask [himself] whether the complaint [he] wants to file sets out a viable claim;" failure to do so does not constitute "good cause" under Rule 16. *Alioto v. Town of Lisbon*, 651 F.3d 715, 720 (7th Cir. 2011) (affirming denial of leave to amend under Rule 16 and rejecting argument that plaintiff had no reason to know his complaint was deficient until defendants filed a motion to dismiss).

Moreover, it is plain from discovery taken to date that plaintiffs failed to allege the facts required to support their claims because they possess no such facts to allege. Defendants have sought discovery about the specifics of any misrepresentations (including omissions) that were made to each plaintiff relating to medications and any resulting injuries. After originally resisting this discovery as "premature," plaintiffs ultimately responded, but with nothing more than the same boilerplate *general* allegations provided in the Amended Complaint, with no particulars of any specific misrepresentation or omission. *Compare, e.g.*, Winner Dec. Ex. 1 at 5-6 (Supplemental Answer) *with* AC ¶ 114. Plaintiffs' other discovery responses are no more informative. Indeed, several plaintiffs have freely admitted that no doctor (and in many instances no one at all) has ever told them that "medications" caused them injury. *See, e.g.*, Winner Dec. Exs. 2 at 4 (Ashmore), 4 at 4 (Sadowski), 3 at 4 (Graham).

Given that plaintiffs have now made it abundantly clear – including in sworn interrogatory answers – that they do not possess facts sufficient to support their claims, the Amended Complaint should be dismissed with prejudice. *Cf. Logic Devices, Inc. v. Apple, Inc.*, 2014 WL 491605, at *3 (N.D. Cal. Feb. 14, 2014) (refusing to permit amendment of patent infringement complaint to add claims that were not addressed in plaintiffs' infringement contentions served under local patent rules).

IV. CONCLUSION

For the reasons stated above, plaintiffs' Amended Complaint should be dismissed with prejudice.

DATED: December 14, 2016

Respectfully submitted,

COVINGTON & BURLING LLP

By: /s/ Sonya D. Winner

Sonya D. Winner (Bar No. 200348)
swinner@cov.com
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111-5356
Telephone: (415) 591-6000
Facsimile: (415) 591-6091

Allen Ruby (Bar No. 47109)
allen.ruby@skadden.com
Jack P. DiCanio (Bar No. 138782)
jack.dicanio@skadden.com
SKADDEN, ARPS, SLATE,
MEAGHER, & FLOM LLP
525 University Avenue, Suite 1400
Palo Alto, CA 94301
Telephone: (650) 470-4660
Facsimile: (650) 798-6550

Attorneys for Defendants

Exhibit A

EXHIBIT A

Paragraphs of Amended Complaint Mentioning Each Plaintiff

Evans:	Paragraphs 9, 15-16, 114, 205, 223-24, 303
King:	Paragraphs 17-18, 114, 248-49, 303
Massey:	Paragraphs 19-20, 114, 225-28, 303
Sadowski:	Paragraphs 21-22, 114, 229-230, 303
Goode:	Paragraphs 9, 23-24, 114, 205, 231-33, 303
Ashmore:	Paragraphs 9, 25-26, 114, 205, 234-240, 303
Wunsch:	Paragraphs 9, 27-28, 114, 205, 244-47, 303
Carreker:	Paragraphs 9, 29-30, 114, 205, 241-43, 303
Lofton:	Paragraphs 9, 31-32, 114, 205, 250-52
Harris:	Paragraphs 9, 33-34, 114, 205, 253-58, 303
Graham:	Paragraphs 35-36, 114, 259-260, 303
Killings:	Paragraphs 37-38, 114, 261-63
Walker:	Paragraphs 9, 39-40, 114, 264-65, 303

Sonya D. Winner (Bar No. 200348)
swinner@cov.com
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, California 94111-5356
Telephone: (415) 591-6000
Facsimile: (415) 591-6091

Allen Ruby (Bar No. 47109)
allen.ruby@skadden.com
Jack P. DiCanio (Bar No. 138782)
jack.dicanio@skadden.com
SKADDEN, ARPS, SLATE, MEAGHER, & FLOM LLP
525 University Avenue, Suite 1400
Palo Alto, CA 94301
Telephone: (650) 470-4660
Facsimile: (650) 798-6550
Attorneys for Defendants

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ETOPIA EVANS, *et al.*,

Plaintiffs,

v.

ARIZONA CARDINALS FOOTBALL CLUB, LLC, *et al.*,

Defendants.

Civil Case No.: 3:16-CV-01030-WHA

DECLARATION OF SONYA D. WINNER IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Date: January 19, 2017
Time: 8:00 a.m.
Dept: Courtroom 8
Judge: Honorable William Alsup

I, Sonya D. Winner, declare and state as follows:

1. I am a Partner at the law firm of Covington & Burling LLP. I am one of the attorneys representing the defendant National Football League Member Clubs in the above-captioned suit. I have personal knowledge of the matters stated herein and, if called upon, could competently testify thereto.

2. Attached as **Exhibit 1** is a true and correct copy of Plaintiff Darryl Ashmore's Supplemental Answer to Defendant NFL Member Clubs' Interrogatory Number Two, which was verified by Mr. Ashmore on November 2, 2016. The Supplemental Answer is prefaced by Mr. Ashmore's original Answer to this interrogatory.

3. Attached as **Exhibit 2** is a true and correct copy of Plaintiff Darryl Ashmore's Answer to Defendant NFL Member Clubs' Interrogatory Number Thirteen, which was verified by Mr. Ashmore on November 2, 2016.

4. Attached as **Exhibit 3** is a true and correct copy of Plaintiff Jeffrey Graham's Answer to Defendant NFL Member Clubs' Interrogatory Number Thirteen, which was verified by Mr. Graham on November 3, 2016.

5. Attached as **Exhibit 4** is a true and correct copy of Plaintiff Troy Sadowski's Answer to Defendant NFL Member Clubs' Interrogatory Number Thirteen, which was verified by Mr. Sadowski on November 1, 2016.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14 day of December, 2016, in San Francisco, California.

By: /s/ Sonya D. Winner
Sonya D. Winner

Exhibit 1

William N. Sinclair (SBN 222502)
(bsinclair@mdattorney.com)
Steven D. Silverman (Admitted *Pro Hac Vice*)
(ssilverman@mdattorney.com)
Stephen G. Grygiel
(sgrygiel@ mdattorney.com)
Phillip J. Closius (Admitted *Pro Hac Vice*)
(pclosius@ mdattorney.com)
Alexander Williams (Admitted *Pro Hac Vice*)
awilliams@mdattorney.com
SILVERMAN|THOMPSON|SLUTKIN|WHITE|LLC
201 N. Charles Street, Suite 2600
Baltimore, MD 21201
Telephone: (410) 385-2225
Facsimile: (410) 547-2432

Thomas J. Byrne (SBN 179984)
(tbyrne@nbolaw.com
Mel T. Owens (SBN 226146)
(mowens@nbolaw.com)
NAMANNY BYRNE & OWENS, P.C.
2 South Pointe Drive, Suite 245
Lake Forest, CA 92630
Telephone: (949) 452-0700
Facsimile: (949) 452-0707

Stuart A. Davidson (Admitted *Pro Hac Vice*)
(sdavidson@rgrdlaw.com)
Mark J. Dearman (Admitted *Pro Hac Vice*)
(mdearman@rgrdlaw.com)
Janine D. Arno (Admitted *Pro Hac Vice*)
(jarno@rgrdlaw.com)
ROBBINS GELLER RUDMAN & DOWD LLP
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: (561) 750-3000
Facsimile: (561) 750-3364

Attorneys for Plaintiffs

[Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ETOPIA EVANS, as the Representative of the Estate of Charles Evans, et al.,

Plaintiffs,

vs.

ARIZONA CARDINALS FOOTBALL CLUB, LLC, et al.,

Defendants.

Case No. 3:16-cv-01030-WHA

PLAINTIFF DARRYL ASHMORE'S SUPPLEMENTAL ANSWERS TO DEFENDANT NFL MEMBER CLUBS' FIRST SET OF INTERROGATORIES

notwithstanding, such lesser injuries would typically include contusions, lacerations, shoulder tears, strains and/or sprains to various areas of the body including, but not limited to, joints, tendons, ligaments, muscles, and/or bones. Mr. Ashmore would frequently experience exacerbations and aggravations of these lesser injuries due to the requirements of professional football.

Following his retirement from the NFL, the injuries suffered by Mr. Ashmore has identified above have manifested as follows:

- Mr. Ashmore regularly experiences neck and back pain and stiffness along with pain.
- Mr. Ashmore regularly experiences pain and stiffness in his shoulders.
- Mr. Ashmore regularly experiences varying degrees of pain and stiffness in both knees.
- Mr. Ashmore regularly experiences varying degrees of pain and stiffness in his hands and wrists.
- Mr. King regularly experiences difficulty sleeping as a result of the chronic injuries and/or conditions and injuries outlined above.
- In or around 2010, Mr. Ashmore was diagnosed with kidney problems related to elevated creatinine and protein levels in his body.

2. IDENTIFY each and every intentional misrepresentation, and every untrue or misleading COMMUNICATION (including both any affirmative misrepresentations and any omissions that YOU contend constituted or contributed to misrepresentations) that YOU contend any PERSON or PERSONS affiliated with any NFL MEMBER CLUB made to YOU RELATING TO MEDICATION YOU took, YOUR injuries from playing football, and/or YOUR physical condition, and state the COMPLETE BASIS why such COMMUNICATIONS were intentional misrepresentations and/or untrue or misleading.

ANSWER: Mr. Ashmore objects to this Interrogatory to the extent it asks him to identify each and every intentional misrepresentation made to him regarding his injuries from playing football or his physical condition. Mr. Ashmore's intentional misrepresentation claims relate only to omissions relating to the administration or provision of Medications. Asking him for his contentions regarding affirmative statements and misrepresentations, whether affirmatively stated or omitted, regarding injuries and his physical condition is therefore overly broad,

irrelevant, and the work it would take to determine which persons were actually affiliated with NFL Member Clubs and what misrepresentations they made regarding those issues would be unduly burdensome. This is especially so with regard to omissions, which by their very nature are not known to the omittee, meaning that Mr. Ashmore, to answer this portion of the Interrogatory, would be forced to identify persons affiliated with NFL Member Clubs and determine whether they made omissions regarding items not relevant to the claim at issue.

To the extent this Interrogatory seeks omissions that Mr. Ashmore contends a person affiliated with NFL Member Clubs made to him related to Medications, Mr. Ashmore objects hereto as premature in light of the early stage of discovery and given Mr. Ashmore's contentions in the above-captioned matter, as set forth more fully in the Complaint and for the reasons discussed in the preceding paragraph, that the NFL Member Clubs are solely in the possession of information that would inform Mr. Ashmore's response hereto.

Mr. Ashmore expects to receive documents and information through discovery that will concern and provide information responsive to this Interrogatory. Because Fed. R. Civ. P. 26 imposes a duty of supplementation, complying with such Interrogatories would require Mr. Ashmore to continually supplement his response each time he receives an additional document or information concerning the subject contention on which this Interrogatory seeks information. Doing so would cause Mr. Ashmore unnecessary burden and expense and would not serve to narrow the issues in dispute. Accordingly, Mr. Ashmore will provide a response encompassing the current state of his knowledge, belief, and understanding, both as to the merits of this action and with respect to experts designated to testify at trial, at an agreed-upon time prior to his deposition.

SUPPLEMENTAL ANSWER: Subsequent to Mr. Ashmore's answer, counsel for the parties narrowed the scope of this interrogatory to require Plaintiffs to identify the specific omissions about which they complain and the other information sought by that interrogatory concerning each such omission, with Defendants reserving the right to seek an answer to the

interrogatory as originally posed and Plaintiffs reserving the right to object. Subject to the foregoing, Mr. Ashmore responds as follows:

While playing with the Los Angeles/St. Louis Rams, Jim Anderson and other trainers whose names Mr. Ashmore cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to Darvocet, Percocet, Celebrex, and sleeping pills, to Mr. Ashmore and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.

While playing with the Washington Redskins, Bubba Tyler and other trainers, and doctors, whose names Mr. Ashmore cannot recall at this time administered pain-numbing and anti-inflammatory medications, including but not limited to painkillers and muscle relaxers in capsule or tablet form, to Mr. Ashmore and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.

While playing with the Oakland Raiders, Rod Martin and Scott Touchet administered pain-numbing and anti-inflammatory medications, including but not limited to Vioxx, Darvocet, Percocet, and sleeping pills, to Mr. Ashmore and failed to: provide a prescription; identify the medication by its established name; provide adequate directions for the medications' use, including adequate warnings of uses that have potentially dangerous health consequences; and provide the recommended or usual dosage for the medications.

7. IDENTIFY each MEDICATION YOU took after ceasing to play football for any NFL MEMBER CLUB RELATING TO any injury, medical condition, damage, harm, or loss allegedly caused, in whole or in part, by YOUR playing football for any NFL MEMBER CLUB or allegedly occurring during the period in which YOU played football for any NFL MEMBER CLUB.

VERIFICATION

I, Darryl Ashmore, am familiar with the contents of my Answers to the Defendant NFL Member Clubs' Third Set of Interrogatories and Supplemental First Set of Interrogatories. My answers are based on, and therefore necessarily limited by, the records and information in existence, presently recollected, and thus far discovered in the course of prosecuting this action. Subject to the limitations set forth herein, and without waiving my right to amend these answers based on subsequently-identified information, I verify under penalty of perjury that my Answers are true and correct to the best of my knowledge, information and belief.

Executed this 2nd day of November, 2016.

Darryl Ashmore

Exhibit 2

William N. Sinclair (SBN 222502)
(bsinclair@mdattorney.com)
Steven D. Silverman (Admitted *Pro Hac Vice*)
(ssilverman@mdattorney.com)
Phillip J. Closius (Admitted *Pro Hac Vice*)
(pclosius@ mdattorney.com)
Alexander Williams (Admitted *Pro Hac Vice*)
(awilliams@mdattorney.com)
SILVERMAN|THOMPSON|SLUTKIN|WHITE|LLC
201 N. Charles Street, Suite 2600
Baltimore, MD 21201
Telephone: (410) 385-2225
Facsimile: (410) 547-2432

Thomas J. Byrne (SBN 179984)
(tbyrne@nbolaw.com)
Mel T. Owens (SBN 226146)
(mowens@nbolaw.com)
NAMANNY BYRNE & OWENS, P.C.
2 South Pointe Drive, Suite 245
Lake Forest, CA 92630
Telephone: (949) 452-0700
Facsimile: (949) 452-0707

Stuart A. Davidson (Admitted *Pro Hac Vice*)
(sdavidson@rgrdlaw.com)
Mark J. Dearman (Admitted *Pro Hac Vice*)
(mdearman@rgrdlaw.com)
Janine D. Arno (Admitted *Pro Hac Vice*)
(jarno@rgrdlaw.com)
ROBBINS GELLER RUDMAN & DOWD LLP
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: (561) 750-3000
Facsimile: (561) 750-3364

Attorneys for Plaintiffs

[Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ETOPIA EVANS, as the Representative of the Estate of Charles Evans, *et al.*, Plaintiffs, vs. **ARIZONA CARDINALS FOOTBALL CLUB, LLC**, *et al.*, Defendants.	CASE NO. 3:16-cv-1030-WHA **PLAINTIFF DARRYL ASHMORE'S ANSWERS TO DEFENDANT NFL MEMBER CLUBS' THIRD SET OF INTERROGATORIES**

- Matt Kasten, author of the October 19, 2014 article "Why Painkiller Abuse is Such a Difficult Issue for the NFL and Its Players" and all players named therein, who can speak to the issues addressed therein;

- Michael J. Fenson, author of the January 31, 2014 article "Super Bowl pomp countered by retired NFL players' painkiller abuse" and all players named therein, who can speak to the issues addressed therein;

- Sara Bellum, author of the September 10, 2013 article "Painkiller Abuse in the NFL: A Hefty Price for Entertainment," who can speak to the issues addressed therein;

- All members of the NFL Prescription Drug Advisory Committee, who can speak to the NFL's knowledge of the problems identified herein.

13. IDENTIFY each PERSON who has ever told YOU that YOU were injured or harmed by YOUR consumption of MEDICATIONS, and for each such PERSON, state the circumstances and date(s) on which he or she provided this information to YOU.

ANSWER: Defendants did not define the term "MEDICATIONS" and Plaintiffs expect it shall have the same meaning as agreed-to by counsel during their meet and confer sessions after the parties exchanged their responses to the initial discovery served in this matter. Subject to the foregoing, Mr. Ashmore states that no Person has told him that he was injured or harmed by his consumption of Medications.

14. Do YOU contend that YOU received any MEDICATIONS from CLUB doctors or trainers, or from other Club personnel acting on their behalf, that were not documented in YOUR medical records? If so, IDENTIFY the circumstances (including the MEDICATIONS that were not so documented, the number of occasions and time periods when you received each such MEDICATION, how you received it, and from whom), and IDENTIFY all evidence you rely on to support the contention.

ANSWER: Once Mr. Ashmore has confirmation that Defendants have produced all of his medical records from his time in the NFL, the same will be reviewed and a supplemental answer will be provided.

15. IDENTIFY the state(s) whose laws YOU contend govern YOUR personal claims in this case, and IDENTIFY all facts that YOU contend are material to that determination. If and to the extent any such facts are currently unknown to YOU, describe the information YOU would need to IDENTIFY them.

VERIFICATION

I, Darryl Ashmore, am familiar with the contents of my Answers to the Defendant NFL Member Clubs' Third Set of Interrogatories and Supplemental First Set of Interrogatories. My answers are based on, and therefore necessarily limited by, the records and information in existence, presently recollected, and thus far discovered in the course of prosecuting this action. Subject to the limitations set forth herein, and without waiving my right to amend these answers based on subsequently-identified information, I verify under penalty of perjury that my Answers are true and correct to the best of my knowledge, information and belief.

Executed this 2nd day of November, 2016.

Darryl Ashmore

Exhibit 3

William N. Sinclair (SBN 222502)
(bsinclair@mdattorney.com)
Steven D. Silverman (Admitted *Pro Hac Vice*)
(ssilverman@mdattorney.com)
Phillip J. Closius (Admitted *Pro Hac Vice*)
(pclosius@ mdattorney.com)
Alexander Williams (Admitted *Pro Hac Vice*)
(awilliams@mdattorney.com)
SILVERMAN|THOMPSON|SLUTKIN|WHITE|LLC
201 N. Charles Street, Suite 2600
Baltimore, MD 21201
Telephone: (410) 385-2225
Facsimile: (410) 547-2432

Thomas J. Byrne (SBN 179984)
(tbyrne@nbolaw.com)
Mel T. Owens (SBN 226146)
(mowens@nbolaw.com)
NAMANNY BYRNE & OWENS, P.C.
2 South Pointe Drive, Suite 245
Lake Forest, CA 92630
Telephone: (949) 452-0700
Facsimile: (949) 452-0707

Stuart A. Davidson (Admitted *Pro Hac Vice*)
(sdavidson@rgrdlaw.com)
Mark J. Dearman (Admitted *Pro Hac Vice*)
(mdearman@rgrdlaw.com)
Janine D. Arno (Admitted *Pro Hac Vice*)
(jarno@rgrdlaw.com)
ROBBINS GELLER RUDMAN & DOWD LLP
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: (561) 750-3000
Facsimile: (561) 750-3364

Attorneys for Plaintiffs

[Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ETOPIA EVANS, as the Representative of the Estate of Charles Evans, *et al.*,

Plaintiffs,

vs.

ARIZONA CARDINALS FOOTBALL CLUB, LLC, *et al.*,

Defendants.

CASE NO. 3:16-cv-1030-WHA

PLAINTIFF JEFFREY GRAHAM'S ANSWERS TO DEFENDANT NFL MEMBER CLUBS' THIRD SET OF INTERROGATORIES

- Sally Jenkins and Rick Maese, authors of a November 27, 2014 Washington Post article "Two former NFL players describe prescription drug practices" and the players named therein, who can speak to the issues addressed therein;
- Matt Kasten, author of the October 19, 2014 article "Why Painkiller Abuse is Such a Difficult Issue for the NFL and Its Players" and all players named therein, who can speak to the issues addressed therein;
- Michael J. Fenson, author of the January 31, 2014 article "Super Bowl pomp countered by retired NFL players' painkiller abuse" and all players named therein, who can speak to the issues addressed therein;
- Sara Bellum, author of the September 10, 2013 article "Painkiller Abuse in the NFL: A Hefty Price for Entertainment," who can speak to the issues addressed therein;
- All members of the NFL Prescription Drug Advisory Committee, who can speak to the NFL's knowledge of the problems identified herein.

13. IDENTIFY each PERSON who has ever told YOU that YOU were injured or harmed by YOUR consumption of MEDICATIONS, and for each such PERSON, state the circumstances and date(s) on which he or she provided this information to YOU.

ANSWER: Defendants did not define the term "MEDICATIONS" and Plaintiffs expect it shall have the same meaning as agreed-to by counsel during their meet and confer sessions after the parties exchanged their responses to the initial discovery served in this matter. Subject to the foregoing, Mr. Graham states that no one has ever told him that he was injured or harmed by his consumption of Medications.

14. Do YOU contend that YOU received any MEDICATIONS from CLUB doctors or trainers, or from other Club personnel acting on their behalf, that were not documented in YOUR medical records? If so, IDENTIFY the circumstances (including the MEDICATIONS that were not so documented, the number of occasions and time periods when you received each such MEDICATION, how you received it, and from whom), and IDENTIFY all evidence you rely on to support the contention.

ANSWER: Once Mr. Graham has confirmation that Defendants have produced all of his medical records from his time in the NFL, the same will be reviewed and a supplemental answer will be provided.

15. IDENTIFY the state(s) whose laws YOU contend govern YOUR personal claims in this case, and IDENTIFY all facts that YOU contend are material to that determination. If and

VERIFICATION

I, Jeffrey Graham, am familiar with the contents of my Answers to the Defendant NFL Member Clubs' Third Set of Interrogatories. My answers are based on, and therefore necessarily limited by, the records and information in existence, presently recollected, and thus far discovered in the course of prosecuting this action. Subject to the limitations set forth herein, and without waiving my right to amend these answers based on subsequently-identified information, I verify under penalty of perjury that my Answers are true and correct to the best of my knowledge, information and belief.

Executed this 3th day of November, 2016.

Jeffrey Graham

Exhibit 4

William N. Sinclair (SBN 222502)
(bsinclair@mdattorney.com)
Steven D. Silverman (Admitted *Pro Hac Vice*)
(ssilverman@mdattorney.com)
Phillip J. Closius (Admitted *Pro Hac Vice*)
(pclosius@ mdattorney.com)
Alexander Williams (Admitted *Pro Hac Vice*)
(awilliams@mdattorney.com)
SILVERMAN|THOMPSON|SLUTKIN|WHITE|LLC
201 N. Charles Street, Suite 2600
Baltimore, MD 21201
Telephone: (410) 385-2225
Facsimile: (410) 547-2432

Thomas J. Byrne (SBN 179984)
(tbyrne@nbolaw.com)
Mel T. Owens (SBN 226146)
(mowens@nbolaw.com)
NAMANNY BYRNE & OWENS, P.C.
2 South Pointe Drive, Suite 245
Lake Forest, CA 92630
Telephone: (949) 452-0700
Facsimile: (949) 452-0707

Stuart A. Davidson (Admitted *Pro Hac Vice*)
(sdavidson@rgrdlaw.com)
Mark J. Dearman (Admitted *Pro Hac Vice*)
(mdearman@rgrdlaw.com)
Janine D. Arno (Admitted *Pro Hac Vice*)
(jarno@rgrdlaw.com)
ROBBINS GELLER RUDMAN & DOWD LLP
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: (561) 750-3000
Facsimile: (561) 750-3364

Attorneys for Plaintiffs

[Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ETOPIA EVANS, as the Representative of the Estate of Charles Evans, *et al.*, Plaintiffs, vs. **ARIZONA CARDINALS FOOTBALL CLUB, LLC**, *et al.*, Defendants.	CASE NO. 3:16-cv-1030-WHA **PLAINTIFF TROY SADOWSKI'S ANSWERS TO DEFENDANT NFL MEMBER CLUBS' THIRD SET OF INTERROGATORIES**

- Matt Kasten, author of the October 19, 2014 article "Why Painkiller Abuse is Such a Difficult Issue for the NFL and Its Players" and all players named therein, who can speak to the issues addressed therein;

- Michael J. Fenson, author of the January 31, 2014 article "Super Bowl pomp countered by retired NFL players' painkiller abuse" and all players named therein, who can speak to the issues addressed therein;

- Sara Bellum, author of the September 10, 2013 article "Painkiller Abuse in the NFL: A Hefty Price for Entertainment," who can speak to the issues addressed therein;

- All members of the NFL Prescription Drug Advisory Committee, who can speak to the NFL's knowledge of the problems identified herein.

13. IDENTIFY each PERSON who has ever told YOU that YOU were injured or harmed by YOUR consumption of MEDICATIONS, and for each such PERSON, state the circumstances and date(s) on which he or she provided this information to YOU.

ANSWER: Defendants did not define the term "MEDICATIONS" and Plaintiffs expect it shall have the same meaning as agreed-to by counsel during their meet and confer sessions after the parties exchanged their responses to the initial discovery served in this matter. Subject to the foregoing, Mr. Sadowski states that no Person has ever told him that he was injured or harmed by his consumption of Medications.

14. Do YOU contend that YOU received any MEDICATIONS from CLUB doctors or trainers, or from other Club personnel acting on their behalf, that were not documented in YOUR medical records? If so, IDENTIFY the circumstances (including the MEDICATIONS that were not so documented, the number of occasions and time periods when you received each such MEDICATION, how you received it, and from whom), and IDENTIFY all evidence you rely on to support the contention.

ANSWER: Once Mr. Sadowski has confirmation that Defendants have produced all of his medical records from his time in the NFL, the same will be reviewed and a supplemental answer will be provided.

15. IDENTIFY the state(s) whose laws YOU contend govern YOUR personal claims in this case, and IDENTIFY all facts that YOU contend are material to that determination. If and to the extent any such facts are currently unknown to YOU, describe the information YOU would need to IDENTIFY them.

ANSWER: Mr. Sadowski states that the injuries described in response to Interrogatory No. 1 occurred in the following states: Georgia, Missouri, New York, New Jersey, Ohio,

VERIFICATION

I, Troy Sadowski, am familiar with the contents of my Answers to the Defendant NFL Member Clubs' Third Set of Interrogatories. My answers are based on, and therefore necessarily limited by, the records and information in existence, presently recollected, and thus far discovered in the course of prosecuting this action. Subject to the limitations set forth herein, and without waiving my right to amend these answers based on subsequently-identified information, I verify under penalty of perjury that my Answers are true and correct to the best of my knowledge, information and belief.

Executed this 1st day of November, 2016.

Troy Sadowski

William N. Sinclair (SBN 222502)
(bsinclair@mdattorney.com)
Steven D. Silverman (Admitted *Pro Hac Vice*)
(ssilverman@mdattorney.com)
Stephen G. Grygiel
(sgrygiel@ mdattorney.com)
Phillip J. Closius (Admitted *Pro Hac Vice*)
(pclosius@ mdattorney.com)
Alexander Williams (Admitted *Pro Hac Vice*)
(awilliams@mdattorney.com)
Andrew G. Slutkin (Admitted *Pro Hac Vice*)
(aslutkin@mdattorney.com)
Steven N. Leitess (Admitted *Pro Hac Vice*)
(sleitess@mdattorney.com)
SILVERMAN|THOMPSON|SLUTKIN|WHITE|LLC
201 N. Charles Street, Suite 2600
Baltimore, MD 21201
Telephone: (410) 385-2225
Facsimile: (410) 547-2432

Thomas J. Byrne (SBN 179984)
(tbyrne@nbolaw.com
Mel T. Owens (SBN 226146)
(mowens@nbolaw.com)
NAMANNY BYRNE & OWENS, P.C.
2 South Pointe Drive, Suite 245
Lake Forest, CA 92630
Telephone: (949) 452-0700
Facsimile: (949) 452-0707

Stuart A. Davidson (Admitted *Pro Hac Vice*)
(sdavidson@rgrdlaw.com)
Mark J. Dearman (Admitted *Pro Hac Vice*)
(mdearman@rgrdlaw.com)
Jason Alperstein (Admitted *Pro Hac Vice*)
jalperstein@rgrdlaw.com
ROBBINS GELLER RUDMAN & DOWD LLP
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: (561) 750-3000
Facsimile: (561) 750-3364

Attorneys for Plaintiffs
[Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ETOPIA EVANS, as the Representative of the Estate of Charles Evans, et al., Plaintiffs, vs. ARIZONA CARDINALS FOOTBALL CLUB, LLC, et al., Defendants.	Case No. 3:16-cv-01030-WHA PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT Date: January 26, 2017 Time: 8:00 A.M. Dept.: Courtroom 8 Judge: Honorable William Alsup

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STATEMENT OF ISSUES

Have Defendants carried their burden of showing that Plaintiffs' claims should be dismissed pursuant to Fed. R. Civ. P. 12?

ALLEGATIONS OF THE COMPLAINT

Plaintiffs bring this suit for redress of injuries resulting from a return to play conspiracy perpetrated by the 32 defendant clubs that comprise the National Football League. ¶ 1.[1] Given the injuries inherent in the game of football, concern for players' health should include giving them adequate rest, having fewer games, and keeping more players on the roster. ¶ 4. But all of that would cut into profit. *Id.* So Defendants chose a different method to keep their players on the field. *Id.* As far back as the mid-1960s, Defendants, through their doctors and trainers, illegally provided players with medications to get them back on the field as soon as possible, regardless of their injuries, and keep them there. ¶ 5. These illegal acts, and the intentional misrepresentations and omissions associated with them, have taken place on every Club through and including at least 2014 and are the subject of this Complaint. ¶¶ 8, 9.

INTRODUCTION

Defendants ignore the Amended Complaint's allegations and impose heightened burdens not applicable at this stage of the proceedings to set up straw man arguments about the plausibility of Plaintiffs' claims. But no matter how much Defendants want this suit to be about injuries that Plaintiffs suffered while playing, or medical malpractice, the suit pled deals with Plaintiffs' injuries suffered from the medications illegally given to them by Defendants. When the actual allegations of the Amended Complaint are read properly and assessed against the proper standards, Plaintiffs' claims survive Defendants' motion to dismiss.

[1] "¶" denotes paragraphs in Plaintiffs' Amended Complaint (Dkt. No. 136).

ARGUMENT

I. Plaintiffs Have Adequately Alleged Plausible Claims For Violations of RICO.

The Amended Complaint pleads sufficient allegations to establish all elements of Plaintiffs' RICO claims under both §§1962(c) and (d). Moreover, Plaintiffs have alleged sufficient facts in this highly unique and complex case to establish the timeliness of their RICO claims such that any argument for dismissal on statute of limitations fails at this early stage. Accordingly, Defendants' motion to dismiss Plaintiffs' RICO claims should be denied.

A. Plaintiffs' RICO Claims Are Not Time-Barred.

Defendants argue that the statute of limitations period for Plaintiffs' RICO claims has expired as a matter of law and that such claims should thus be dismissed. In doing so, Defendants ignore the high burden they must meet. Statute of limitations is ordinarily an affirmative defense that Defendants must plead and prove. *United States v. Carter*, 906 F.2d 1375, 1378 (9th Cir. 1990).[2] ***Proving*** this affirmative defense ***at the pleading stage*** is, naturally, difficult. Thus, when such a defense is raised, "a complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim" *Pesnell v. Arsenault*, 543 F.3d 1038, 1042 (9th Cir. 2008) (citing *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995)).[3]

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[2] Here, and throughout, internal quotation marks and citations are omitted, and emphasis is supplied unless otherwise noted.

[3] Although *Supermail Cargo* based its holding on the now "retired" pleading standard set forth in *Conley v. Gibson*, *Pesnell* nonetheless post-dates *Bell Atl. Corp. v. Twombly* and has been relied on several times. *See*, *e.g.*, *Adler v. Sullivan*, 2013 U.S. Dist. LEXIS 96469, at *13 (E.D. Cal. July 9, 2013); *Knighton v. Kemper Sports Mgmt.*, 2012 U.S. Dist. LEXIS 156951, at *5 (D. Or. Sep. 25, 2012); *Teamsters Local 617 Pension & Funds v. Apollo Grp., Inc.*, 633 F. Supp. 2d 763, 780 (D. Ariz. 2009); *but see Kamar v. Krolczyk*, 2008 U.S. Dist. LEXIS 55975, at *23 (E.D. Cal. July 16, 2008).

Furthermore, dismissal can only be granted "if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Morales v. City of Los Angeles*, 214 F.3d 1151, 1153 (9th Cir. 2000). "Because the applicability of the equitable tolling doctrine often depends on matters outside the pleadings, it is not generally amenable to resolution on a Rule 12(b)(6) motion." *Supermail Cargo*, 68 F.3d at 1206; *see also Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 1003-04 (9th Cir. 2006) (same). Defendants have not met their burden to prove beyond doubt that no reasonable juror could find that the statute of limitations for Plaintiffs' RICO claims was tolled or that Plaintiffs could not have discovered their injuries despite reasonable diligence.

Moreover, Defendants ignore that Plaintiffs' RICO claims are not solely based on the ending of their NFL careers. Plaintiffs also seek redress for their post-NFL career economic injuries, including loss of employment, diminished earnings, and loss of employment opportunities, sustained as a result of Defendants' fraudulent scheme. *See* ¶¶ 201, 205, 269 (last common question), 325. As demonstrated below, Plaintiffs' RICO claims for these economic injuries accrued within the four-year period of time preceding the filing of Plaintiffs' complaint, and thus, even accepting Defendants' statute of limitations arguments, these claims are timely. Any argument to the contrary at this stage would be at odds with the Court's prior recognition that "the nature of at least some of the [plaintiffs'] injuries was latent and slow in developing." *Evans v. Ariz. Cardinals Football Club LLC*, 2016 U.S. Dist. LEXIS 86207, at *15 (N.D. Cal. July 1, 2016). Indeed, it was for this reason that the Court previously rejected Defendants' argument for dismissal, finding that "it is not possible to say as a matter of law on this record that the statute of limitations categorically bars plaintiffs' claims." *Id.* That rationale equally applies

here, as Plaintiffs' post-NFL career economic injuries were only discovered years after their NFL careers ended.

1. Plaintiffs' RICO Claims are Timely Under the Discovery Rule.

Defendants contend that because Plaintiffs knew when their NFL careers ended, they knew of their injuries (the premature ending of their NFL careers) at the time their careers ended. Defendants further contend that because Plaintiffs knew of their injuries, the limitations period began to run as soon as their careers ended, regardless of whether they knew such injuries were caused by Defendants' RICO violations. These arguments miss the mark as Defendants incorrectly assume that the ending of Plaintiffs' careers was in and of itself an injury. However, at the time that their careers ended, Plaintiffs had no reason to believe they were injured – they simply knew that they were being released from their Clubs and were unable to sign new contracts with other Clubs. The fact that a literal "injury" may have led to the ending of their NFL careers does not necessarily mean that Plaintiffs had knowledge that the ending of their careers was an injury for purposes of RICO.

Moreover, even if Plaintiffs need not know that their injuries are caused by a RICO violation, it is axiomatic that they need to have knowledge that their injuries were ***caused by the conduct of Defendants*** for the limitations period to begin to run ***for causes of action against Defendants***. *See Ward v. Chanana*, 2008 U.S. Dist. LEXIS 105502, at *12 (N.D. Cal. Dec. 23, 2008) ("As a predicate for dismissing Plaintiff's RICO claim on the grounds that Plaintiff had constructive notice of his RICO injury, the Court requires that Plaintiff have had the ability to connect his nominal injury to an actual violation of the RICO statute."). To hold otherwise would "penalize [Plaintiffs] for an inability to distinguish between financial injury as a result of Defendants' wrongdoing, and financial loss arising out of potentially legitimate [wear and tear of

Plaintiffs' aging bodies]." *Id.* Here, it was only until years after their careers ended that Plaintiffs discovered that the ending of the NFL careers were economic injuries cognizable under RICO in and of themselves, and moreover, that they were caused by Defendants' conduct. Thus, at the time their careers ended, Plaintiffs not only had no factual basis for pursuing an investigation against Defendants, but they had no legal basis to do so either.

At the very least, the issue of when Plaintiffs became aware that Defendants' violations of the federal drug laws caused them economic injury presents a highly intensive factual inquiry not suitable for determination on a motion to dismiss. *See, e.g., Westways World Travel, Inc. v. AMR Corp.*, 2005 U.S. Dist. LEXIS 47293, at *32 (C.D. Cal. Sept. 13, 2005) (denying motion for summary judgment of RICO claim on statute of limitations, finding "a genuine issue of material fact as to whether [plaintiff] knew or should have known of the injury underlying its civil RICO claim within the statute of limitations."); *Med. Supply Inc. v. SCS Support Claims Servs.*, 17 F. Supp. 3d 207, 222 (E.D.N.Y. 2014) (denying motion to dismiss RICO claims on statute of limitations grounds because "the Court cannot conclude at this juncture that plaintiff's claims are time-barred.").

2. Plaintiffs' RICO Claims are Timely Under the Fraudulent Concealment Doctrine.

Even if this Court were to find that Plaintiffs' cause of action under RICO accrued from the date their NFL careers ended, Plaintiffs adequately pled facts to establish that Defendants' fraudulent concealment equitably tolled the statute of limitations. *See Tatung Co. v. Shu Tzu Hsu*, 2016 U.S. Dist. LEXIS 157450, at *32 (C.D. Cal. Nov. 14, 2016) ("Equitable tolling doctrines, including fraudulent concealment, apply in civil RICO cases."); *Tanaka v. First Hawaiian Bank*, 104 F. Supp. 2d 1243, 1252 (D. Haw. 2000) ("Even if Plaintiff's RICO claims

are otherwise barred, equitable tolling could still save the claims."); *see also Target Tech. Co., LLC v. Williams Advanced Materials, Inc.*, 2008 U.S. Dist. LEXIS 97247, at *41 (C.D. Cal. Nov. 21, 2008) ("Where a plaintiff suspects wrongdoing but fails to discover the responsible party due to fraud, although the discovery rule will not toll the statute of limitations the fraudulent concealment doctrine will.").

"The purpose of the fraudulent concealment doctrine is to prevent a defendant from 'concealing a fraud . . . until such a time as the party committing the fraud could plead the statute of limitations to protect it.' Thus, '[a] statute of limitations may be tolled if the defendant fraudulently concealed the existence of a cause of action in such a way that the plaintiff, acting as a reasonable person, did not know of its existence.'" *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1194 (N.D. Cal. 2015). Further, and particularly important at this stage, "the question of whether a plaintiff knew or should have become aware of a fraud" is ordinarily left to the jury. *Cohen v. Trump*, 2014 U.S. Dist. LEXIS 23885, at *16 (S.D. Cal. Feb. 21, 2014) (quoting *Living Designs, Inc., v. E.I. Dupont de Nemours and Co.*, 431 F.3d 353, 365 (9th Cir. 2005)); *see also Tanaka*, 104 F. Supp. 2d at 1253 ("Plaintiffs' knowledge of the fraud, as with knowledge of the injury, is a question of fact for purposes of the tolling question. If anything, the record indicates that Plaintiffs knew of their injury before they knew it was related to fraud.").

At the time Plaintiffs' NFL careers ended, they lacked the requisite information by which, with reasonable diligence, they could have discovered that their careers ended prematurely as a result of Defendants' tortious conduct. The reason for Plaintiffs' lack of knowledge of their claims is primarily, if not solely, traceable to the efforts by Defendants to conceal the risks of Medications provided. ¶¶365-401. The Clubs, through their doctors and

trainers, administered dangerous Medications to players without adequate – or any – warnings as to the long-term risks associated with the Medications. ¶¶109-114. These Medications were given without the FDA-mandated prescriptions (¶366), the names of the Medications being taken (¶367), instructions as to their use (¶368), and often even by slipping pills to players in paper envelopes on airplanes, simply telling players it will make them feel better. ¶¶222-265.

Not only did Defendants have a duty to warn players of the risks associated with the Medications, which they purposely concealed from Plaintiffs, they also had a duty to comply with the Controlled Substances Act in the dealing of controlled substances to Plaintiffs, which they repeatedly failed to do over the course of many decades without Plaintiffs' knowledge. Plaintiffs were thus prevented from obtaining the necessary facts and information that could have led them to discover their RICO causes of action at an earlier time. These allegations, which must be taken as true for purposes of ruling on this motion, are sufficient to establish equitable tolling for Defendants' fraudulent concealment.

3. Plaintiffs' RICO Claims Based On Their Post-NFL Career Injuries Were Tolled Due To The Speculative Nature of The Damages They Sustained.

Defendants fail to address Plaintiffs' post-NFL career economic injuries underlying their RICO claims, which occurred years after Plaintiffs' careers ended. Any argument on reply that Plaintiffs' claims based on these injuries are untimely should be rejected for two independent reasons. First, as set forth above, Plaintiffs only discovered these economic injuries (*i.e.*, that they were unable to hold gainful employment and would suffer diminished earning capacity due the Medications they were illegally given by Defendants) during the four-year period of time preceding the filing of the amended complaint, and thus, are timely.

Second, assuming *arguendo* that the post-career economic injuries were discovered prior to that time, the damages sustained from those injuries were not. Accordingly, Plaintiffs' claims based on their post-NFL career economic injuries had not yet accrued at that time. Indeed, "[w]here damages are so speculative as to defeat any award, a cause of action will not accrue until the damages are actually suffered, regardless of when the act causing those damages occurred." *Mc Mahon v. Pier 39 L.P.*, 2001 U.S. Dist. LEXIS 18730, at *11 (N.D. Cal. Nov. 8, 2001) (citing *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 339 (1971)). "This exception requires the Court to determine whether [a plaintiff] could have been fully compensated for his injuries had he filed his action within four years of the alleged maltreatment." *Mc Mahon*, 2001 U.S. Dist. LEXIS 18730, at *11. As stated by the Supreme Court in *Zenith Radio Corp.*:

> [I]f a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. . . .
>
> The cause of action for future damages . . . will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any date within four years from the date they were inflicted.

401 U.S. at 339.

Here, Plaintiffs allege economic damages in the form of loss of post-NFL employment opportunities and diminished earnings due to the Medications illegally provided by Defendants that simply could not have been recovered if they had brought a lawsuit within four years of the date their NFL careers ended. Accordingly, Plaintiffs should be permitted to recover those damages now. *See id.* ("We must now determine whether Zenith could have recovered those damages if it had brought suit for them in 1954, for if it could not, it would follow for the reasons stated above that it must be permitted to recover them now."). It is this type of "uncertain

damage, which prevent[s] recovery," as distinguished "from an uncertain ***extent*** of damage, which does not prevent recovery," that renders Plaintiffs' claims timely. *Grimmett v. Brown*, 75 F.3d 506, 516 (9th Cir. 1996). Exactly when in time Plaintiffs obtained their right to recovery for these post-NFL injuries is a question of fact inappropriate for resolution at the motion to dismiss stage.

B. Plaintiffs Have Sufficiently Alleged a Conspiracy to Violate RICO.

Plaintiffs alleged that Defendants conspired to increase revenues, decrease expenses, and improve the NFL's market share by agreeing to illegally pump players full of Medications to artificially inflate their short-term performance and ability to return to play, at the expense of their long-term health and wellbeing. Plaintiffs identify dozens of instances of such conduct occurring in open violation of federal law, which Defendants, uniformly, both participated in themselves and either directly aided or tacitly supported. The RICO allegations would not be possible without a conspiratorial agreement between Defendants.

Defendants would have this Court believe that hundreds of NFL team doctors, trainers, and executives, from all thirty-two Clubs, independently and coincidentally agreed to violate federal law and harm Plaintiffs and the Class. Defendants claim that, rather than the cogent and compelling allegations of a RICO conspiracy pled by Plaintiffs, the more compelling theory – taking Plaintiffs' allegations as true – is that each and every instance of illegal and harmful conduct pled in the Amended Complaint was an independent decision to violate federal drug laws made by each and every individual Club doctor and trainer. Apparently, Defendants argue that every single instance of this wrongdoing, across decades of Plaintiffs' playing careers and with each and every Club, is a red herring; since Plaintiffs have not produced a signed contract binding all Clubs to the RICO conspiracy, no agreement could be possible, and Plaintiffs have

merely identified instances of parallel conduct.[4] At the motion to dismiss stage, this contrary factual argument has no place, is thwarted by Plaintiffs' abundant allegations that rise above mere parallel conduct, and so the motion to dismiss must be rejected.

1. Plaintiffs' Allegations Far Exceed Recitation of Parallel Conduct.

The cause of action for conspiracy to violate RICO arises under 18 U.S.C. §1962(d), which states that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." "To establish a violation of section 1962(d), Plaintiffs must allege either an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses." *Bias v. Wells Fargo & Co.*, 942 F. Supp. 2d 915, 942 (N.D. Cal. 2013) (denying motion to dismiss RICO conspiracy claim). One who "adopt[s] the goal of furthering or facilitating the criminal endeavor" may be held liable as "conspiracy defendant[.]" *Id.* "The illegal agreement need not be express as long as its existence can be inferred from the words, actions, or interdependence of activities and persons involved." *Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768, 775 (9th Cir. 2002) (dismissed on other grounds); *Brewer v. Salyer*, 2007 U.S. Dist. LEXIS 36156, at *37 (E.D. Cal. May 16, 2007) (same). Direct evidence of a conspiracy, such as an admission by a defendant's representative that the defendant was a conspirator, "is seldom available." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1547 (9th Cir. 1989) (reversing summary judgment of conspiracy claim in favor of defendant). Thus, "[p]roof of agreement in RICO conspiracy cases 'can, and often is, based on inferences drawn from

[4] In fact, Defendants believe that the theory of a never-ending stream of coincidental illegal and harmful conduct is more plausible than a top-down direction to put players on the field at all costs, simply because Plaintiffs did not identify the instances where appropriate medical treatment ***was*** provided to players. Defs' Mem. at 12 n.7.

circumstantial evidence.'" *In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 682 F. Supp. 1073, 1094 (C.D. Cal. 1987).

These inferences drawn from circumstantial evidence must be detailed enough to provide "plausible grounds to infer an agreement." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). This must rise above "an allegation of parallel conduct and a bare assertion of conspiracy." *Id.* Allegations of circumstantial evidence and parallel conduct require "something more" to plausibly suggest an agreement, and they "must be placed in a context that raises a suggestion of a preceding agreement." *Id.* at 555, 557. Plaintiffs have met this standard, and a conspiratorial agreement can clearly be inferred.

Defendants incorrectly argue that the allegations in the Amended Complaint are mere rote recitation of parallel conduct, lacking evidence of a conspiratorial agreement due to the absence of the "something more" necessary to sufficiently plead a conspiracy. *Id.* at 555; Defs' Mem. at 11. They further claim that the parallel conduct identified in the Amended Complaint is the product of numerous independent business and medical evaluations, each of which are a product of competition and indicative of a lack of collaboration between Clubs. *See*, *e.g.*, *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1193 (9th Cir. 2015). This simplistic argument ignores the abundant additional information pled in the Amended Complaint, including motive, opportunity, and numerous specific illegal acts, along with certain admissions from the NFL, that far exceeds merely identifying instances of parallel conduct.

For example, this Court assessed an assortment of "plus factors" that would "nudge the alleged conspiracy from conceivable to plausible" in *B & R Supermarket, Inc. v. Visa, Inc.*, 2016 U.S. Dist. LEXIS 136204, at *23 (N.D. Cal. Sep. 30, 2016). That case, an antitrust case involving allegations that credit card companies and major banks conspired to shift liability onto

merchants for fraudulent credit card charges, identified numerous instances of parallel conduct, along with "plus factors" that jelled the allegations into a cogent conspiracy allegation. *Id.* Those factors included "depart[ure] from the preexisting pattern elsewhere in the world," a "common motive to conspire as to [the complained-of conduct" due to the consequences of acting alone, an "absence of competitive behavior," and an "opportunity to collude." *Id.* at *23-27. Applying these factors to the RICO allegations reveals the sufficiency of the allegations in the Amended Complaint.

To identify a "departure from preexisting patterns," one need look no further than the gross deviation in the standard of care provided by Club doctors and trainers, as compared to non-Club affiliated medical practitioners. *Id.* at *23. Doctors nationwide recognize that opiates should not be mixed with the operation of heavy machinery, or even driving vehicles, yet Club doctors provided opiates to players who were about to compete (or in the midst of competition) at the highest level of a violent sport, who were all-but-guaranteed to be hit by other elite athletes at dangerous levels of force. ¶¶222-265. Medical doctors outside of the NFL would not support this. In fact, the NFL has, at points, recognized the painkiller crisis it created and the dangers associated with misuse of Medications. ¶¶207-221. This includes recognition that Clubs distributed Medications in manners that expressly departed from the standards imposed by federal law. ¶¶212, 219.

As observed in Harvard's recently-released Football Players Health Study, the pressure to return players to the field exerted by Clubs onto their doctors creates "an inherent structural conflict of interest" so great that it results in different levels of care for athletes compared to the care that would be provided by independent doctors. ¶172; *see* Christopher R. Deubert, *et al.*, The Football Players Health Study at Harvard University, *Protecting and Promoting the Health*

of NFL Players: Legal and Ethical Analysis and Recommendations at 16, Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics, Harvard Law School (Nov. 2016), https://footballplayershealth.harvard.edu/ (last visited Dec. 27, 2016) ("The intersection of club doctors' dual obligations creates significant legal and ethical quandaries that can threaten player health. Most importantly, the current structure of NFL club medical staff—how they are selected, evaluated, and terminated, and to whom they report—creates an inherent structural conflict of interest in the treatment relationship and poses concerns related to player trust, no matter how upstanding or well-intentioned any given medical professional might be.").

Next, this Court looked to the "common motive to conspire," as compared to the consequences of acting alone. *B & R Supermarket*, 2016 U.S. Dist. LEXIS 136204, at *25. Plaintiffs have pled a compelling theory that, taken as true, demonstrates that the Clubs prioritized immediate return-to-play to improve the televised product, its games, at the expense of the health and safety of its players. ¶¶89-104. Forcing injured players onto the field and masking their injuries with Medications would artificially inflate their performance and ultimately increase the profits of all Clubs, and thus all Clubs were incentivized to conspire and promote the alleged RICO conduct. ¶¶94-103. This also allowed Clubs to operate with smaller active rosters, thus reducing expenses for all clubs. ¶¶89-90.

On the other hand, in the absence of such an agreement, if one Club unilaterally elected to pump its players full of Medications to give them a short-term competitive advantage at the expense of the players' long-term careers and health, the reaction would be immediate and visceral. Veteran players would note the discrepancy between this rogue Club's decisions and their former Clubs, and other Clubs would discover that the rogue Club was violating federal law

and harming the health of players for a competitive advantage. Such scrutiny would, as discussed below, result in serious consequences for the Club.

Defendants argue that the widespread illegal and harmful distribution of Medications is evidence that the teams were competing directly, rather than subverting competition and conspiring together. *B & R Supermarket*, 2016 U.S. Dist. LEXIS 136204, at *26. Though more typically at issue in antitrust cases, the principle rings true here; if the teams were as dedicated to pure competition as Defendants speciously argue (Defs' Mem. at 12), then a home team would not have allowed other teams to illegally distribute controlled substances to away team players, since that would improve their opponent's ability to field a competitive roster and defeat them in that game. *See generally* ¶¶196-236, 313. Instead, home teams actively supported away teams' decisions to violate the Controlled Substances Act by illegally distributing Medications to players while at opposing stadiums.[5] Defendants would also have a competitive incentive to report Clubs that violate federal law to ensure athletes prematurely return-to-play, especially given that Clubs have no reticence to report other conduct they deem improper.[6] This is strong evidence that the Clubs ***agreed*** to promote return-to-play over player safety.

[5] The Controlled Substances Act and its implementing regulations prohibit a physician from, among other things, dispensing controlled substances at ***any location*** he or she has not registered with the DEA. 21 U.S.C. §822(e); 21 C.F.R. §§1301.11(a) & 1301.12(a). Thus, any time a team physician dispensed controlled substances to a player in a hotel, on an airplane, or at an away team's stadium, for example, federal law was violated.

[6] For recent examples, the Indianapolis Colts reported the New England Patriots' decision to underinflate game balls, resulting in suspensions, fines, and lost draft picks. Michael McCann, *Deflategate, one year later: The anatomy of a failed controversy*, SPORTS ILLUSTRATED, Jan. 17, 2016, http://www.si.com/nfl/2016/01/18/deflategate-one-year-later-tom-brady-bill-belichick. The Kansas City Chiefs were fined a total of $350,000 and docked multiple draft picks for calling a prospective free agent prior to the allowed time. Adam Teicher, *Chiefs lose picks, fined for pursuit of Jeremy Maclin in 2015*, ESPN.com, Mar. 10, 2016, http://www.espn.com/nfl/

As to the "opportunity to collude," Defendants' common attendance at conferences related to the alleged conduct, with evidence that representatives of the Defendants were present, supported the plausibility of the allegations and counted as one of several "plus factors" that warranted denial of the motion to dismiss in *B & R Supermarket*. *Id.* at *27-28. Here, Plaintiffs have identified numerous common meetings attended by team doctors and trainers (*see, e.g.*, ¶¶83-88), along with the General Managers of the Clubs, the ultimate overseers and decision-makers responsible for the medical and training staff. ¶116. They even used the identical drug tracking software (SportPharm) to further the scheme, at least until it was shut down, after the DEA and California Board of Pharmacy got wind of illegal conduct emanating from SportPharm and its sister company, RSF Pharmacy, out of the same location. ¶¶121, 312-314. The opportunity for collusion was clearly present.

The cases cited by Defendants are fundamentally inapposite and easily distinguished. *Musical Instruments* dealt with allegations that uniformly rising musical instrument prices were traced to an antitrust violation, but the factual enhancements pled by the plaintiffs failed to plausibly allege that the defendants were not merely reacting to market forces in similar manners. 798 F.3d at 1197-98. There is no such market here and even if there were, engaging in the same conduct that is violative of two federal statutes (and numerous state statutes) for decades by 32 clubs scattered across the United States suggests that there was something far worse going on here than reacting to market forces. Likewise, in *Vertkin v. Wells Fargo Home Mortg.*, plaintiffs did not cite any "facts plausibly indicative of anything more than lawful parallel conduct." 2011 U.S. Dist. LEXIS 48081, at *12 (N.D. Cal. Jan. 18, 2011); *see also*

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story/_/id/14938272/kansas-city-chiefs-docked-two-draft-picks-fined-tampering-pursuit-jeremy-maclin-2015.

Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1049 (9th Cir. 2008) ("Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws."). By contrast, Plaintiffs here cited to ***dozens of illegal acts*** involving the named plaintiffs, a fact that Defendants hardly contest.

Finally, Defendants cite *Mazur v. eBay Inc.* for the proposal that a common motivation to make money does not sufficiently plead a RICO claim. 2008 U.S. Dist. LEXIS 57105, at *19 (N.D. Cal. July 23, 2008). Plaintiffs, however, have identified (1) both a motive and an opportunity to conspire, (2) abundant and widespread illegal conduct, and (3) collusive practices where Clubs support each other's violations of federal laws in each other's stadiums, where prohibiting such a practice would provide them with a competitive advantage. Such allegations rise far beyond what was at issue in *Mazur*.

Plaintiffs have pled dozens of instances of Clubs engaging in unlawful – and harmful – distribution of Medications to their players, spanning all 32 teams and decades of play, which supports the allegations that the Clubs conspired to distribute these Medications unlawfully. These allegations are accompanied by a cogent explanation of the Clubs' motive and opportunity to conspire, along with abundant circumstantial evidence that the Clubs conspired to violate the RICO statute together. Given that Plaintiffs' allegations must be taken as true at this stage, Defendants' counter-argument that Plaintiffs merely pled dozens of coincidences must be rejected. They are free to plead this factual argument before a jury.

2. Plaintiffs Have Alleged Valid RICO Conspiracy Claims Against All Defendants.

Lastly, Defendants make a cursory argument that, because the six RICO Plaintiffs fail to

allege specific factual allegations that each and every Club ended their careers, then the claims against all of the other Clubs must be dismissed. This is an incorrect statement of the law.

To properly allege a conspiracy involving multiple defendants, "the complaint need not delineate with precision the roles of the various defendants, but it must inform each defendant of what he did to join the conspiracy." *Brewer*, 2007 U.S. Dist. LEXIS 36156, at *37. The Amended Complaint has clearly done so, as each and every Club violated federal drug laws in the administration of Medications to players, and each and every Club engaged in a systemic return-to-play conspiracy that sacrificed the health of players at the altar of profits and short-term gains. No Defendant is uncertain as to whether they, for example, gave controlled substances to players while away from the home stadium (*i.e.*, the Club doctor's DEA-registered location).

Further, "[v]icarious liability for a co-conspirator's independently wrongful overt acts committed in furtherance of the RICO conspiracy is consistent with the long-standing principle that a conspirator should be held liable for the foreseeable consequences of the unlawful agreement." *Bryant v. Mattel*, 2010 U.S. Dist. LEXIS 103851, at *48-49 (C.D. Cal. Aug. 2, 2010). The Clubs that were not individually responsible for ending the named Plaintiffs' careers were nevertheless co-conspirators who either directly aided and abetted the Club that ***was*** directly responsible (such as the sharing of controlled substances at away games from home team doctors) or tacitly responsible, by allowing away team doctors to illegally distribute Medications at their games knowing that such conduct violated the Controlled Substances Act. Agreeing to engage in this practice would foreseeably result in these outcomes, and no Club should be dismissed for this reason.

C. Plaintiffs Adequately Allege an Injury by Reason of the RICO Violation.

Defendants' challenge to Plaintiffs' RICO injuries is more telling for what they do not say than for what they do. For example, Defendants do not mount a challenge to the fact that Plaintiffs' career losses are "business injuries" within the purview of RICO. *See* Defs' Mem. at 10. Nor do Defendants dispute that the alleged violations of the Controlled Substances Act or mail and fraud statutes may constitute racketeering acts under RICO. *See id.* at 9 & n.6. They quibble instead over whether Plaintiffs' injuries were proximately caused by "any specific ***racketeering*** acts by any defendant." *See id.* (emphasis in original). This is a straw man argument. As explained below, Plaintiffs need only allege an injury caused by Defendants' scheme. Under this correct standard, Plaintiffs allege an injury by reason of the RICO violation.

The RICO statute provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . ." 18 U.S.C. §1964(c). Defendants' own authorities hold that "RICO is to be read broadly. . . . [And t]he statute's remedial purposes are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Sedima v. Imrex Co.*, 473 U.S. 479, 497-98 (1985) (cited in Defs' Mem. at 8). The Supreme Court has emphasized in cases more recent than the ones cited by Defendants that proximate causation "is a flexible concept that does not lend itself to a black-letter rule that will dictate the result in every case." *See Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008). All that is required is that Plaintiffs' injury was a "foreseeable and natural consequence of [defendants'] scheme." *Id.* at 658.

As the causal link between the violation and injury hinges on the scheme rather than a specific act, proximate causation is nowhere as onerous as Defendants demand. It is not

necessary to draw a straight line from a club trainer thrusting a Vicodin pill into Plaintiff Carreker's (or any other plaintiff's) hand to the moment he was carried off the field, never to return. *Cf.* Defs' Mem. at 9. Nor does it require Carreker to link his post-playing career losses to a particular Vicodin pill supplied on such-and-such day. *Cf. id.* at 9-10. Indeed, Defendants' own authorities confirm that "proximate cause is not the same thing as the sole cause." *Oki Semiconductor*, 298 F.3d at 773 (cited in Defs' Mem. at 8). "Instead, the proximate cause of an injury is a substantial factor in the sequence of responsible causation." *Id.*

Consistent with *Bridge*, it is sufficient for Plaintiffs to allege that the financial impact on their careers was a "foreseeable and natural consequence of" Defendants' scheme. *See* 553 U.S. at 658. In this case, it was foreseeable that the scheme to pump players full of painkillers to keep them on the field short-term, without disclosing side effects and safety risks, would interfere with their careers and ability to hold a job in the longer-term. This is precisely what Plaintiffs allege. *See*, *e.g.*, ¶¶324-26; *see also* Dkt. No. 89 at 2.

This theory of damages is neither complex nor attenuated (*cf.* Defs' Mem. at 10); it is simple cause and effect. Defendants conspired to keep players on the field and in the dark about the danger of playing on painkillers that masked their pain – the body's natural defense mechanism against further injury. As a direct result of playing on their injuries instead of taking time to heal, Plaintiffs' playing careers were ultimately shortened, and their post-playing careers compromised. *See*, *e.g.*, *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (*en banc*) (*per curiam*) (finding as actionable under RICO physical injuries that amounted to "intentional interference with contract and interference with prospective business relations.") (cited in *Xcentric Ventures,*

LLC v. Borodkin, 798 F.3d 1201, 1203 (9th Cir. 2015)). Plaintiffs have, therefore, adequately alleged an injury to their business or property by reason of Defendants' RICO violations.[7]

Defendants' argument concerns proximate causation, but meanders into the sufficiency of the mail and wire fraud allegations. *See* Defs' Mem. at 9. Such meandering is easily dispatched. First, Defendants are wrong to suggest that Plaintiffs fail to plead any specifics about the mailings and interstate wires. *Compare id.*, *with*, *e.g.*, ¶¶315-17. Plaintiffs' mail and wire allegations are sufficient to put Defendants on notice of the claims, particularly given that Rule 9(b) is relaxed, where, as here, the mailings and wires remain in Defendants' hands. *See Waldrup v. Countrywide Fin. Corp.*, 2015 U.S. Dist. LEXIS 2169, at *19-*20 (C.D. Cal. Jan. 5, 2015). The whole point, after all, is that Defendants concealed information from Plaintiffs. As Plaintiffs have described the mailings and wires, Defendants' citation to *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986), is unavailing. *See* Defs' Mem. at 9. In any event, the lesson of *Schreiber* is that plaintiffs must be given an opportunity to cure any deficiency before dismissal with prejudice. *See* 806 F.2d at 1401-02.[8]

[7] Defendants' footnote 5 and reference to speculation miss the mark. Plaintiffs expressly allege that, "but for" defendants' scheme, they would not have suffered their career losses – or to the degree that they did. *See, e.g.*, ¶252. These allegations are taken as true. *See* Dkt. No. 89 at 2. Defendants' cases are inapposite as they pertain to third parties whose RICO claims rose and fell based on speculation about others' conduct. *See, e.g.*, *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 241 F.3d 696, 702 (9th Cir. 2001) (third-party hospital districts); *In re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 248 (3d Cir. 2012) (third-party payor lacked Article III standing for failing to allege defendants' conduct caused doctors to write prescriptions for off-label uses for which it paid). These cases are even further afield where, as here, the RICO claims primarily concern material omissions.

[8] The Amended Complaint alleges a RICO violation with sufficient particularity to survive Defendants' motion. In the event the Court disagrees, given the complexity of the law and the uniqueness of the facts and the allegations in this case, the proper remedy is to grant Plaintiffs the opportunity to amend the complaint in conformity with the reasoning of the Court. *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990) ("We

Second, contrary to Defendants' suggestion, it is not necessary that the misrepresentations or omissions about the painkillers were made via the mails or the interstate wires. *See* Defs' Mem. at 9. The Supreme Court has emphasized that the mailing or wire may be "routine and innocent in and of itself," so long as it is an essential part of the execution of the scheme. *Schmuck v. United States*, 489 U.S. 705, 711-12 (1989). Similarly, the mailings and wires need not be directed at, or relied upon, by any RICO plaintiff: "Using the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud, and hence a predicate act of racketeering under RICO, even if no one relied on any misrepresentation." *Bridge*, 553 U.S. at 658. Here, Defendants' communications about the painkillers, including ordering and shipping of the drugs, sent via mail and wires were essential to executing their scheme. *See*, *e.g.*, ¶314. Accordingly, it is no barrier to Plaintiffs' RICO claims that the omission of material safety information about the painkillers was conveyed orally to Plaintiffs. *See*, *e.g.*, *Martinelli v. Petland, Inc.*, 2010 U.S. Dist. LEXIS 5965, at *19-*20 (D. Ariz. Jan. 26, 2010) (finding oral misrepresentations actionable under RICO). Plaintiffs' mail and wire fraud allegations are sufficient at this stage.

For these reasons, Plaintiffs have adequately alleged that the injuries to their business – their careers – were by reason of Defendants' violations of the RICO statute.

II. Plaintiffs Have Alleged Plausible State Law Claims Against Defendants.

Defendants contend that Plaintiffs' state law claims, and their class allegations, should be dismissed. But Defendants failed to raise the arguments at issue regarding the intentional misrepresentation and conspiracy claims in their initial motion to dismiss and should not be

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have held that in dismissals for failure to state a claim, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.").

allowed to do so now. Even if they could, all three claims are well-pled. Thus not only should they survive, but so too should Plaintiffs' class action allegations (even if their RICO claims are dismissed) as Plaintiffs seek certification under Rule 23(c)(4) for their state law claims (*see, e.g.*, all the references to "Class Members" throughout the state law claims portion of the Amended Complaint, ¶¶ 331, 333-46, 366-83, 405-08).

A. The Clubs Applied the Wrong Law.

In seeking dismissal of Plaintiffs' state law claims, Defendants apply only California and Ninth Circuit law. But as they conceded when arguing their initial motion to dismiss, Maryland law applies as those claims were filed in the United States District Court for the District of Maryland. *See Allstate Ins. Co. v. Countrywide Fin. Corp.*, 824 F. Supp. 2d 1164, 1169-70 (C.D. Cal. 2011) ("The case was transferred from the Southern District of New York pursuant to 28 U.S.C. §1404(a). The Court will therefore apply the substantive law, including choice-of-law rules, of New York to Allstate's state law claims."). That Plaintiffs filed an amended complaint changes nothing. *See In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 489 F. Supp. 2d 932, 936 (D. Minn. 2007) ("Normally, in a non-MDL setting, a transferor court's choice-of-law rules continue to apply even if the complaint is later amended in the transferee court.") (citing *Brown v. Hearst Corp.*, 54 F.3d 21, 24 (1st Cir. 1995) (utilizing transferor court's choice-of-law rules even though that claim-at-issue arose after the transfer by way of an amendment to the original complaint)). Plaintiffs will therefore apply Maryland law to their state law claims as appropriate.

B. The Clubs Failed to Raise the Arguments at Issue Regarding the Misrepresentation and Conspiracy Claims in Their Initial Motion to Dismiss.

Plaintiffs' initial complaint contained two claims: intentional misrepresentation and conspiracy. Defendants sought dismissal of those claims on preemption and statute of limitation

grounds only. The Court denied that motion. Defendants now seek dismissal of those claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, an argument they could have raised in their initial motion but did not. Because those claims substantively did not change between the original and amended claims, Defendants should be barred from seeking their dismissal.

Fed. R. Civ. P. 12(g)(2) provides that "[e]xcept as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." Thus, where a defendant makes a successive motion to dismiss under Rule 12(b)(6), "the key inquiry is whether an argument for dismissal was available to a defendant in response to an earlier version of the complaint yet omitted from the defendant's previous motion to dismiss. If so, the argument cannot be raised in a successive motion to dismiss." *Hild v. Bank of Am., N.A.*, 2015 U.S. Dist. LEXIS 55029, at *11 (C.D. Cal. Apr. 21, 2015); *see also Jones v. US Bank Nat'l Assoc.*, 2012 U.S. Dist. LEXIS 34873, at *24-25 (N.D. Ill. Mar. 15, 2012) ("An amended complaint . . . does not automatically revive the defenses and objections a defendant waived in its first motion to dismiss, nor does it allow a defendant to advance arguments that could have been made in the first motion to dismiss."); *Dicio v. Wells Fargo Bank, N.A.*, U.S. Dist. LEXIS 164169, at *47-50 (W.D. Pa. Nov. 4, 2015); *Naples v. Stefanelli*, 2015 U.S. Dist. LEXIS 16251, at *13-14 (E.D.N.Y. Feb. 7, 2015); *G.L.M. Sec. & Sound, Inc. v. LoJack Corp.*, 2012 U.S. Dist. LEXIS 142549, at *9 (E.D.N.Y. Sept. 28, 2012). Rather, a defendant may only "bring a second motion under Rule 12 to object to . . . new allegations only." *Sears Petroleum & Transp. Corp. v. Ice Ban Am., Inc.*, 217 F.R.D. 305, 307 (N.D.N.Y. 2003).

Here, the Amended Complaint adds no new substantive allegations for Plaintiffs' intentional misrepresentation and conspiracy claims. The same Plaintiffs[9] assert the exact same claims against the exact same Defendants. Indeed, there is no difference in the conspiracy claim between the original and amended complaints. *See* **Exhibit A** hereto (redline comparison of intentional misrepresentation and conspiracy claims in original and amended complaints). And while the intentional misrepresentation claim in the Amended Complaint has a few changes regarding omissions, they add nothing new as the original complaint pled that claim and clearly addressed omissions. *See*, *e.g.*, Dkt. 1, ¶¶247-284. Rather, those additions are present in the Amended Complaint only to clarify that the intentional misrepresentation claim in fact covers omissions. As they add nothing new, they cannot be the basis for a second Rule 12 motion on Plaintiffs' intentional misrepresentation claims, and Defendants' motion to dismiss Plaintiffs' intentional misrepresentation and conspiracy claims should be denied.

C. The State Law Claims Are Well Pled and Succeed as a Matter of Law.

Defendants seek dismissal of Plaintiffs' intentional misrepresentation, concealment, and conspiracy claims on the grounds that Plaintiffs failed to plead with the requisite specificity their intentional misrepresentation and concealment claims and that Plaintiffs' conspiracy claim fails as a matter of law. For the reasons discussed below, the Clubs are wrong.

1. Plaintiffs Adequately Pled Their Intentional Misrepresentation and Concealment Claims.

Defendants contend that Plaintiffs' intentional misrepresentation and concealment claims fail to satisfy the heightened pleading standard of Fed. R. Civ. P. 9(b) with regard to the elements

[9] While true that Mel Renfro asserted those claims in the original complaint and is not a party to the Amended Complaint, that does not matter. His withdrawal adds no new allegations (like, *e.g.*, if new plaintiff Reggie Walker had asserted these claims), which per above is the test to determine whether a second Rule 12 motion can be filed.

of deceit, reliance, and proximate cause. *See* Defs' Mem. at 16. Plaintiffs concede that these claims under Maryland law contain those elements and that, except as discussed below, must satisfy Rule 9(b). But for the following reasons, Defendants' arguments miss the mark.

a. The Standard Is Not as High as the Clubs Would Like.

Defendants seek to impose a far more stringent pleading standard on Plaintiff's intentional misrepresentation and concealment allegations than required by Rule 9(b), which requires only that a pleading identify "the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Neubronner v. Milken*, 6 F.3d 666, 671-72 (9th Cir. 1993); *see also Rosengarten v. Buckley*, 565 F. Supp. 193, 196 (D. Md. 1982).[10] The Ninth Circuit has long construed Rule 9(b) to require only that allegations of fraud are "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Brooks v. ComUnity Lending, Inc.*, 2010 U.S. Dist. LEXIS 67116, at *27 (N.D. Cal. July 6, 2010); *see also Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999). Thus, Rule 9(b) does not require a plaintiff to allege each and every detail. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1998); *see also Rosengarten*, 565 F. Supp. at 196.

Further, "the requirement of specificity is relaxed when the allegations indicate that the defendant must necessarily possess full information concerning the facts of the controversy or when the facts lie more in the knowledge of the opposite party." *Comerica Bank v. McDonald*, 2006 U.S. Dist. LEXIS 86306, at *8 (N.D. Cal. Nov. 17, 2006); *see also Hendrickson v. Standard Oil Co.*, 95 A. 153, 158 (Md. 1915). This is especially true here, where information

[10] Because of the relative alignment in their views espoused, Plaintiffs cite both Ninth and Fourth Circuit and California and Maryland law in this section.

regarding Defendants' administration of medications, such as Plaintiffs' medical records, and the dangers posed by such administration, such as the information that the doctors and trainers possessed, continues to be in the Clubs' possession and/or concealed from Plaintiffs. Plaintiffs' allegations are more than "sufficient to give Defendant fair notice of the particular misconduct that forms the basis of [their] claims" and thus meet Rule 9(b). *True v. Am. Honda Motor Co.*, 520 F. Supp. 2d 1175, 1183 (C.D. Cal. 2007); *see also Harrison,* 176 F.3d at 784.

Finally, as this Court has held, a "fraud by omission claim is not required to meet the heightened pleading standard under Rule 9(b)." *Graebner v. James*, 2012 U.S. Dist. LEXIS 175508, at *12 (N.D. Cal. Dec. 11, 2012) (Alsup, J.) (denying motion to dismiss); *Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1099 (N.D. Cal. 2007) (Alsup, J.) (declining to dismiss plaintiffs' fraud by omission claim for failure to precisely state the time and place of the fraudulent conduct); *see also Shaw v. Brown & Williamson Tobacco Corp.*, 973 F. Supp. 539, 552 (D. Md. 1997). Thus, Plaintiffs' concealment claim and, to the extent it is based on omissions, intentional misrepresentation claims do not need to satisfy the heightened pleading requirement of Rule 9(b), but rather Rule 8, which "requires only that the complaint include 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Doe I v. Redd*, 2003 U.S. Dist. LEXIS 26120, at *30 (N.D. Cal. Aug. 4, 2003) (Alsup, J.); *see also Shaw*, 973 F. Supp. at 552.

b. Plaintiffs Sufficiently Plead the "Who, What, When, Where and How."

Plaintiffs alleged the "who" (*i.e.*, Defendants and their employees and agents, including the doctors and trainers of the NFL's 32 teams and, in particularity, the following team trainers: Bubba Taylor, Rod Martin, Scott Touchet, Edward "Hunter" Smith, Dave Hammer, Dominic

Gentile, James Popp, Steve Antonopulos, Jim Gillen, James Collins, Bob Lundy, Junior Wade, Don Cochran, Ken Locker, John Omohundro, Jeffrey Herndon, Jim Shearer, John Kasik, Sam Ramsden, Ken Smith, Donald Rich, Todd Torcelli, Jim Whalen, Lindsey McLean, Shone Gipson, Brad Brown, Dean Kleinschmidt, Al Bellamy, Mike Ryan, Ronnie Barnes, Byron Hansen, John Norwig, Ralph Berlin, Paul Sparling, Robert Recker), *see* ¶¶1, 41-72, 114; the "when" (*i.e.*, from 1976 to the present, with specific time periods alleged as to each Plaintiff), *see id.* at ¶¶8, 15-40, 267; the "what" and "how" (*i.e.*, Club doctors and trainers gave players medications on a daily basis without telling them what they were taking and failed to disclose the negative effects of the medications and the risks for increased frequency and severity of injuries so they could play through injuries for the profit motives of the Clubs, and misrepresented to players the nature of their injuries so they would return to play), *see id.* at ¶¶1-9, 104-127, 223-265, 328-331, 366-371; and the "where" (*i.e.*, the many different cities and states where the NFL teams are located), *see id.* at ¶¶15-40, 114, 223-265.

In short, the SAC alleges a widespread and consistent practice of the Clubs and their employees and agents acting with deceit and fraud, which suffices at this stage of the proceedings. *See*, *e.g.*, *Stewart v. Wachowski*, 2005 U.S. Dist. LEXIS 46703, at *33 (C.D. Cal. June 13, 2005) (the complaint meets the requirements of Rule 9(b) where it "adequately pleads the existence of a scheme to defraud"); *see also Chambers v. King Buick GMC, LLC*, 43 F. Supp. 3d 575, 593-99 (D. Md. 2014).

c. Plaintiffs Adequately Allege Reliance.

The Amended Complaint is replete with allegations concerning Plaintiffs' reliance, including that they "reasonably relied on what the Clubs did say – 'here you go, take this and get out there'" even though this message did not include any information about the risks associated

with various Medications (¶335); "reasonably believed the Clubs were taking their best interests into consideration when they provided and administered Medications" (*id.* at ¶336); "reasonably believed the Clubs would not act illegally and, in doing so, injure the Class Members and put them at risk of substantial and continuing future injuries." (*id.* at ¶338); and "justifiably acted and detrimentally relied on [the Clubs'] intentional misrepresentations." (*id.* at ¶339).

Plaintiffs also satisfy the reliance element of their concealment claim. As a direct result of (a) taking prescription-strength narcotics, (b) cocktailing narcotics, and (c) playing through severe injuries numbed by narcotics, Plaintiffs suffer from heart and kidney problems, chronic pain, and other, serious ailments. *Id.* at ¶¶379-387. Reading the Amended Complaint as a whole, "it may [] be inferred that [P]laintiff[s] . . . would have acted differently had [they] known of the [omitted] fact[s]." *Lovejoy v. AT&T Corp.*, 92 Cal. App. 4th 85, 96 (Cal. Ct. App. 2001); *Nelson v. Matrixx Initiatives, Inc.*, 2012 U.S. Dist. LEXIS 69950, at *14-15 (N.D. Cal. May 18, 2012).; *see also Edens v. Goodyear Tire & Rubber Co.*, 858 F.2d 198, 206-07 (4th Cir. 1988). Where, as here, the misrepresentations and omissions are material, reliance may be presumed. *See*, *e.g.*, *Engalla v. Permanente Med. Group*, 15 Cal. 4th 951, 977 (Cal. 1997); *see also Edens*, 858 F.2d at 206-07.

2. Plaintiffs' Conspiracy Claim Does Not Fail as a Matter of Law.

Defendants argue that Plaintiffs' conspiracy claim should be dismissed because Plaintiffs "have 'not provide[d] sufficient facts to satisfy even the first element of civil conspiracy,' i.e., that a conspiracy was formed" and allegedly fail to "plead an independently actionable tort." Defs' Mem. at 14, 15. As to the latter argument, Plaintiffs agree that if the RICO, intentional misrepresentation, and concealment claims are dismissed, so too must the conspiracy claim. But

for the reasons discussed *supra*, those claims should not be dismissed and thus neither should the conspiracy claim.

Defendants predicate the former argument solely on the grounds advanced in support of their argument that Plaintiffs failed to adequately plead a RICO conspiracy. *Id.* at 14. But the Clubs cite no authority to support the leap from what is necessary to plead a conspiracy claim under Section 1 of the Sherman Act (at issue in *Twombly*, the predicate for their RICO conspiracy argument) and what is necessary to plead a Maryland civil conspiracy claim. And Plaintiffs are aware of no such authority (indeed, *Twombly* and *Iqbal* pleading standards have not been addressed by Maryland's appellate courts).

Under Maryland law, the elements of a civil conspiracy are: (1) a confederation of two or more persons by agreement or understanding; (2) some unlawful or tortious act done in furtherance of the conspiracy or use of unlawful or tortious means to accomplish an act not in itself illegal; and (3) actual legal damages resulting to the plaintiff. *See, e.g., Lloyd v. Gen. Motors Corp.*, 916 A.2d 257, 284 (Md. 2007). Applying those elements, the Clubs' argument can be easily discarded.

As an initial matter, the Clubs are a confederation of two or more persons by agreement – they comprise the sole members of the NFL – which Plaintiffs adequately pled. *See* Dkt. 136 at 9-12 ("Defendants Comprise the [NFL]"). Further, Plaintiffs have adequately pled that the Clubs, through their employees and/or agents, made intentional misrepresentations, both affirmatively and through omissions (*i.e.*, engaged in tortious acts), to get players back on the field at the players' expense and the Clubs' bottom line (*i.e.*, in furtherance of the conspiracy). *See* ¶¶ 327-401. And while true that a conspiracy claim must be supported by "pointed facts" and not "vague assertions," *Lloyd*, 916 A.2d at 285, which of course is not the exacting standard

announced in *Twombly*, as discussed throughout this brief, "pointed facts" are what Plaintiffs have pled. Thus the second element is satisfied. Lastly, Plaintiffs have pled that those "intentional misrepresentations and omissions were a cause in fact" and "proximately caused" Plaintiffs' "damages, injuries and losses, both economic and otherwise, alleged in this Complaint." *See* Dkt. 136 at 99. Nothing more is required.[11]

CONCLUSION

Plaintiffs respectfully request that the Court deny the Motion to Dismiss.

DATED: January 4, 2017

William N. Sinclair
Steven D. Silverman
Phillip J. Closius
Alexander Williams
Andrew G. Slutkin
Steven D. Leitess
Stephen G. Grygiel
SILVERMAN|THOMPSON|SLUTKIN|WHITE|LLC

/s/
William N. Sinclair (SBN 222502)
(bsinclair@mdattorney.com)
201 N. Charles St., Suite 2600
Baltimore, MD 21201
Telephone: (410) 385-2225
Facsimile: (410) 547-2432

Thomas J. Byrne
Mel T. Owens
NAMANNY BYRNE & OWENS, P.C.
2 South Pointe Drive, Suite 245
Lake Forest, CA 92630
Telephone: (949) 452-0700
Facsimile: (949) 452-0707

[11] Many of the arguments advanced in support of the RICO claims, such as the sufficiency of pleading a conspiracy, apply with equal force to Plaintiffs' state law claims and are incorporated hereby. Moreover, given space limitations, Plaintiffs could not address each and every point that Defendants make regarding their state law claims but that does not mean Plaintiffs concede those points; to the contrary, Plaintiffs will be prepared at oral argument to address each and every point that Defendants may raise.

Stuart A. Davidson
Mark J. Dearman
Jason H. Alperstein
ROBBINS GELLER RUDMAN & DOWD LLP
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: (561) 750-3000
Facsimile: (561) 750-3364

Rachel L. Jensen (SBN 211456)
ROBBINS GELLER RUDMAN & DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: (619) 231-1058
Facsimile: (619) 231-7423

Attorneys for Plaintiffs

EXHIBIT A

COUNT ~~I~~III – INTENTIONAL MISREPRESENTATION

~~(~~(All Plaintiffs except Reggie Walker Against All Defendants)

1. Plaintiffs adopt by reference all allegations contained in the paragraphs above, as if fully set forth herein.

2. The Clubs continuously and systematically made intentional misrepresentations to Class Members as documented herein about the Medications that they provided.

3. The Clubs continuously and systematically misrepresented the increased risk of latent injuries resulting from the Medications.

4. The Clubs continuously and systematically misrepresented to the Class Members the dangers of playing while the pain of injuries was masked by the Medications, including the risk of further and permanent damage to affected body parts.

5. The Clubs misrepresented material facts, extremely important to understanding the dangers of the Medications, to the Class Members.

6. The Clubs knew that the representations were false or made the representations with such reckless disregard for the truth that knowledge of the falsity of the statement can be imputed to the Clubs.

7. The Clubs intended to deceive the Class Members through its knowing and intentional misrepresentations.

8. The Clubs knew that Class Members would rely on what they said about the Medications that kept the Class Members on the field.

9. The Class Members reasonably relied on what the Clubs did say – "here you go, take this and get out there." That message did not include: disclosure of the numerous and serious risks associated with the Medications; the need for informed consent; the need for

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independent medical evaluation, diagnoses and prescription; the need for monitoring for toxicity, potentially serious or even fatal drug interactions; and any recognition of, let alone adherence to, limitations on frequency and duration of the Class Member's exposure to these Medications.

10. The Class Members reasonably believed the Clubs were taking their best interests into consideration when they provided and administered Medications.

11. The atmosphere of trust inherent in locker rooms, in which players become friendly with their Clubs' medical and training staffs, inured the Class Members to any suspicion that the Medications they were given and administered might be dangerous.

12. The Class Members reasonably believed the Clubs would not act illegally and, in doing so, injure the Class Members and put them at risk of substantial and continuing future injuries.

13. The Class Members were in fact deceived by the Club's misrepresentations, and justifiably acted and detrimentally relied on those intentional misrepresentations.

14. The Clubs are liable for their intentional misrepresentations to the Class Members.

15. The Clubs' intentional misrepresentations were a cause in fact of the Class Members' damages, injuries and losses, both economic and otherwise, alleged in this Complaint.

16. The Clubs' intentional misrepresentations proximately caused the Class Members' damages, injuries and losses, both economic and otherwise, alleged in this Complaint, all of which are ongoing and will continue for the foreseeable future.

17. The Class Members suffered damages and losses factually and proximately caused by their reasonable and justifiable reliance on the Clubs' intentional misrepresentations and omissions about the Medications.

18. The Clubs are liable to the Class Members for all categories of damages, in the greatest amounts permissible under applicable law.

19. As a result of the foregoing uniform, agreement-based misrepresentations, Plaintiffs and the Class Members ingested vast amounts of opioids, anti-inflammatories and other analgesics, and local anesthetics during their NFL careers that they otherwise would not have, all of which occurred without proper medical diagnosis, supervision and monitoring; in quantities exceeding recommended dosages; and for periods far longer than recommended treatment intervals.

20. As a result of Defendants' provision and administration of Medications, the Class Members are currently suffering from, or at a substantially-increased risk of developing, physical and/or internal injuries resulting from the provision and administration of the Medications.

21. Such injuries, and the substantially-increased risks thereof, are latent injuries. They develop over time, often undetected at first because the absence, paucity or modest nature of early symptoms are readily explained away as "old age" or caused by some other factor independent of Defendants' provision and administration of Medications.

22. Such latent injuries include, without limitation, musculoskeletal deterioration, arthritic and osteoarthritic progression, and damage to internal organs.

23. Defendants had superior knowledge to that of the Class Members concerning the current use, and latent injuries, associated with the provision and administration of the Medications to the Class Members.

24. Despite that knowledge, Defendants systematically misrepresented to the Class Members that Defendants' administration of the Medications would have no adverse impact on their health or concealed the scope of injuries from which the Class Members might suffer.

25. The Class Members' latent injuries, and substantially increased risks of developing physical maladies later in their lives, necessitate specialized medical investigation, monitoring, testing and treatment not generally required by or given to the public at large.

26. The testing and medical monitoring regime required for the Class Members is specific to their experience with the Clubs' provision and administration of the Medications.

27. Persons not exposed to the Medications that the Clubs provided and administered to the Class Members would not require a testing and medical monitoring regime like that necessary to protect the Class Members.

28. The testing and medical monitoring regime will include baseline testing of each Class Member, with diagnostic examinations, to determine whether the Class Member is currently suffering from any of the physical injuries associated with the Medications.

29. This testing and medical monitoring regime will also include evaluations of the non-currently symptomatic Class Members to determine whether, and, if so, by how much, they are at increased risk for developing the injuries at issue in the future.

30. This testing and medical monitoring regime will help to prevent, or mitigate, the numerous adverse health effects the Class Members suffered and will suffer from Defendants' provision and administration of the Medications.

31. Scientifically-sound and well-recognized medical and scientific principles and observations support the efficacy of the testing and medical monitoring regime the Class Members require.

32. Testing and monitoring the Class Members will help prevent or mitigate the development of the injuries at issue.

33. Testing and monitoring the Class Members will help to ensure that they do not go without adequate treatment that could either prevent, or mitigate, the occurrence of the injuries at issue.

34. In addition to compensatory and punitive damages against Defendants, Plaintiffs seek a mandatory continuing injunction creating and imposing a Court-ordered, Defendants-funded testing and medical monitoring program to help prevent the occurrence of Medication-caused injuries and disabilities, to help ensure the prompt diagnosis and early treatment necessary to reduce the degree or slow the progression of such Medication-caused problems, and otherwise to facilitate the treatment of such problems.

35. This testing and medical monitoring program should include a trust fund, under the supervision of the Court or Court-appointed Special Master who makes regular reports to the Court about the fund.

36. This trust fund is required to pay for the testing and medical monitoring and treatment the Class Members require as a matter of sound medical practice, regardless of the frequency, cost or duration of such testing, monitoring and treatments.

37. Plaintiffs have no adequate legal remedy with regard to the latent injuries described herein. Money damages are by themselves insufficient to compensate the Plaintiffs and Class Members for the continuing risks associated with such injuries.

38. Absent the testing and medical monitoring program described in the preceding paragraphs, the Plaintiffs will remain unprotected against the continuing risk, created by Defendants' misconduct, of subsequent development and manifestation of physical injuries that are now latent.

COUNT ~~H~~IV – CIVIL CONSPIRACY

~~(~~(All Plaintiffs Against All Defendants)

39. Plaintiffs adopt by reference all allegations contained in the paragraphs above, as if fully set forth herein.

40. Since at least the mid-1960s, the Clubs, by agreement or understanding, created a ~~culture~~practice or policy that places an emphasis on returning players to the field as soon as possible with little if any consideration for the short or long-term effects such return to play will have on the players' health. They have done so in part by violating Federal and State laws as detailed herein.

41. The Clubs have acted on their agreement or understanding through intentional misrepresentations and/or concealment and omissions that they have made to players about the Medications and their health as detailed herein. Through these intentional misrepresentations and omissions, the Clubs have coerced players to return to play far sooner than they should have, to the Clubs' benefit and the players' detriment.

42. The Clubs' intentional misrepresentations and omissions were a cause in fact of the Class Members' damages, injuries and losses, both economic and otherwise, alleged in this Complaint.

43. The Clubs' intentional misrepresentations proximately caused the Class Members' damages, injuries and losses, both economic and otherwise, alleged in this Complaint, all of which are ongoing and will continue for the foreseeable future.

44. The Class Members suffered damages and losses factually and proximately caused by their reasonable and justifiable reliance on the Clubs' intentional misrepresentations and omissions about the Medications.

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45. The Clubs are liable to the Class Members for all categories of damages, in the greatest amounts, permissible under applicable law.

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Sonya D. Winner (Bar No. 200348)
swinner@cov.com
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, California 94111-5356
Telephone: (415) 591-6000
Facsimile: (415) 591-6091

Allen Ruby (Bar No. 47109)
allen.ruby@skadden.com
Jack P. DiCanio (Bar No. 138782)
jack.dicanio@skadden.com
SKADDEN, ARPS, SLATE, MEAGHER, & FLOM LLP
525 University Avenue, Suite 1400
Palo Alto, CA 94301
Telephone: (650) 470-4660
Facsimile: (650) 798-6550
Attorneys for Defendants

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ETOPIA EVANS, *et al.*, Plaintiffs, v. ARIZONA CARDINALS FOOTBALL CLUB, LLC, *et al.*, Defendants.	Civil Case No.:3:16-CV-01030-WHA **REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT** Date: January 26, 2017 Time: 8:00 a.m. Dept: Courtroom 8 Judge: Honorable William Alsup

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I. INTRODUCTION

Plaintiffs' Opposition fails to address their fundamental failure to plead *facts* to support necessary elements of their claims. The Opposition offers few citations to the Amended Complaint, and most of those are to conclusory boilerplate assertions rather than concrete allegations of fact. The individual plaintiffs are scarcely mentioned; notwithstanding the detailed analysis presented in defendants' Motion, there is almost no discussion in the Opposition of plaintiff-specific facts that support any of the plaintiffs' claims. And plaintiffs' descriptions of the applicable law – which almost entirely ignore governing Supreme Court and Ninth Circuit authority – are consistently off the mark.

Plaintiffs' arguments about their RICO claims are illustrative. Those claims are plainly barred by the statute of limitations. The Amended Complaint explicitly alleges that plaintiffs suffered injuries to their "business" more than a decade before the case was filed. Nonetheless, plaintiffs assert that the limitations period did not begin to run until they realized that their injuries were caused by unlawful conduct. That argument has been flatly rejected by the Supreme Court and the Ninth Circuit in decisions that plaintiffs do not even mention, much less attempt to distinguish. Plaintiffs fare no better in suggesting that the statute of limitations was tolled by fraudulent concealment, which they have not even pled. To the contrary, plaintiffs assert that the conduct they challenge occurred "in open violation of federal law." Opp. at 9.

Plaintiffs make no effort to rebut defendants' plaintiff-by-plaintiff showing that there is no allegation that, if proved, would establish that a RICO violation was the proximate cause of their asserted "business" injuries. The Opposition does not even attempt to explain how lapses in record-keeping or the administration of medication at an away game (instead of at a club's home facility) could have been the proximate cause of any business injury alleged in the Amended Complaint. Instead, the Opposition offers only generalized arguments about causation and the pleading of RICO violations that are both legally inaccurate and ultimately off-point.

Equally unavailing is plaintiffs' attempt to defend their RICO conspiracy allegations. Plaintiffs argue that a conspiracy may be inferred because they have shown that every doctor and trainer for every NFL club over the past 50 years intentionally violated federal law in a manner that injured the "business" of plaintiffs and other players. The Amended Complaint does not plead facts showing

anything of the sort; at most it identifies isolated actions by some (but not all) of the defendants – none of which are alleged to have had any adverse impact on plaintiffs. Moreover, plaintiffs have not come close to setting forth the facts necessary to plead an *agreement* among defendants under the standard established by the Supreme Court and the Ninth Circuit.

Plaintiffs do not seriously contest defendants' showing that they have failed to plead their common-law fraud claims with particularity. Instead, they primarily argue that they should not be required to do so. The law is to the contrary.

It is telling that much of the Opposition rests on efforts to rewrite the standards that apply to plaintiffs' pleading and to this Motion. A plaintiff whose claim is facially barred by the statute of limitations is required affirmatively to plead facts that would support tolling of the statute; Rule 9(b) requires more than mere notice pleading for both statutory and common-law claims sounding in fraud; and state-law claims pled in federal court are subject to federal – not state – pleading requirements. These are black-letter rules. Plaintiffs' efforts to avoid them reflect a clear recognition of the fundamental deficiencies in the Amended Complaint, which should be dismissed with prejudice.

II. ARGUMENT

A. Plaintiffs Fail to State a Claim on Which Relief May Be Granted Under RICO.

1. Plaintiffs' RICO Claims Are Barred by the Statute of Limitations.

The limitations period for RICO claims is four years, and it is undisputed that each of the RICO plaintiffs retired (or, under their view, was forced into retirement) from professional football more than a decade before this case was filed. There is no allegation that any plaintiff was injured by any act of any defendant that occurred after he retired.

It is well-established that a complaint should be dismissed when its own allegations show that the claims are time-barred, even though the defense is an affirmative one. *See, e.g.*, *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007). Where, as here, the limitations period has clearly run, the burden is on the plaintiff to allege facts sufficient to warrant tolling. *Grimmett v. Brown*, 75 F.3d 506, 514 (9th Cir. 1996). And when a plaintiff seeks tolling based on an allegation of fraudulent concealment, all of the required elements of fraudulent concealment must be pled with particularity. *Id.*

Plaintiffs offer three arguments in an effort to avoid the RICO statute of limitations. *First*, they argue that the statute did not begin to run when their respective careers ended because, although each of them knew then of his alleged "business" injury, he did not know at that time that this injury was caused by a violation of RICO. Opp. at 4. The Supreme Court squarely rejected this argument in *Rotella v. Wood*, 528 U.S. 549 (2000). The statute of limitations begins running for a RICO claim the moment a plaintiff knows of his injury, even if he has no idea that it was caused by a RICO violation. *Id.* at 555; *Pincay v. Andrews*, 238 F.3d 1106, 1109 (9th Cir. 2001); *see also Grimmett*, 75 F.3d at 515 ("The limitations period does not toll simply because a party is ignorant of her cause of action.").

Plaintiffs cannot avoid this rule by arguing that derivative injuries – such as loss of endorsement income – that stemmed from the primary injury incurred more than a decade ago may have continued more recently. As a threshold matter, the Amended Complaint does not identify *any* injury to business or property that any plaintiff suffered for the first time after 2004. Only one plaintiff (Goode) alleges any specific business injury other than the end of his playing career – a loss of endorsement income in 1993. *See* AC ¶ 233. In any event, the Ninth Circuit has held that once a plaintiff has suffered injury from a RICO violation, the limitations clock is not re-set by further injuries that flow from the same conduct; rather, a separate limitations period applies to additional injuries only if they are caused by a "new and independent act" by the defendant. *Grimmett*, 75 F.3d at 513; *see also Just Film, Inc. v. Merchant Services, Inc.*, 2010 WL 4923146, at *15 (N.D. Cal. Nov. 29, 2010) (to "reset" the statute of limitations, there must be "a new and independent act that is not merely a reaffirmation of a previous act; and . . . it must inflict new and accumulating injury on the plaintiff") (emphasis omitted; citation omitted). Here, there is – and can be – no allegation that any plaintiff was injured by any "new and independent act" by any defendant that occurred after he retired from professional football.

Second, plaintiffs argue that the statute of limitations should be tolled under the equitable doctrine of fraudulent concealment. Opp. at 5. This argument fails at the threshold because the Amended Complaint does not plead fraudulent concealment. *See Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 249–50 (9th Cir. 1978) (plaintiff has burden of pleading and proving fraudulent concealment). Moreover, plaintiffs "must plead with particularity the facts giving rise to the fraudulent concealment claim and must establish that they used due diligence in trying to uncover the

facts." *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1415–16 (9th Cir. 1987); *see also Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1060 (9th Cir. 2012).[1]

Fraudulent concealment is not deemed to have been alleged simply because the underlying claim asserts fraud. Rather, the plaintiff must specifically allege that: (1) the defendant took *affirmative* action to mislead the plaintiff about the existence of his RICO claim; (2) the plaintiff did not have actual or constructive knowledge of the facts giving rise to his claim; and (3) the plaintiff acted diligently in trying to uncover the facts giving rise to his claim. *See Hexcel*, 681 F.3d at 1059.

The Amended Complaint alleges none of these things. It does not allege *affirmative* conduct by defendants to conceal from plaintiffs the existence of their claims. *See Grimmett*, 75 F.3d at 514-15 ("fraudulent concealment is invoked *only* if the plaintiff both pleads and proves that the defendant *actively* misled her") (first emphasis added). To the contrary, plaintiffs contend that the conduct they challenge occurred "in *open* violation of federal law." Opp. at 9 (emphasis added). And plaintiffs' argument that fraudulent concealment may be inferred simply because "they lacked the requisite information" (Opp. at 6) falls far short of satisfying the Ninth Circuit's requirement that a plaintiff alleging fraudulent concealment identify *affirmative* acts of concealment by the defendants.[2]

As for the second element, the Amended Complaint is replete with allegations demonstrating that plaintiffs were fully aware of many of the "facts" on which they base their claims and were at least on constructive notice of others. *See, e.g.*, AC ¶¶ 113-14, 225, 231, 234-35, 241, 244, 248, 250, 253, 259, 261, 264, 303 (alleging receipt of pills on airplanes, in visitor locker rooms, in unmarked containers, without prescriptions, and/or without identifying the names of the medications). On the third element –

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[1] Plaintiffs' counsel were clearly aware of this pleading requirement; the same lawyers attempted to plead fraudulent concealment in the complaint in *Dent v. National Football League*, No. C-14-2324 WHA (N.D. Cal. Sept. 11, 2014), from which much of the content of the complaints in this case was copied. Neither the Complaint nor the Amended Complaint in this case includes allegations analogous to those offered in *Dent* on fraudulent concealment. *See Dent* Dkt. No. 65 ¶¶ 50-54 & Count IV.

[2] Moreover, in trying to base a fraudulent concealment argument on the same allegations of omissions on which they rest their claims (*see* Opp. at 6-7), plaintiffs ignore the Ninth Circuit's requirement that the acts relied upon to establish fraudulent concealment must be "*above and beyond* the wrongdoing upon which the plaintiff's claim is filed." *Guerrero v. Gates*, 442 F.3d 697, 707 (9th Cir. 2003).

due diligence – the Amended Complaint is entirely silent. In short, plaintiffs have not even come close to satisfying the standard for pleading fraudulent concealment.

Third, plaintiffs argue that the statute of limitations should be tolled because some of the injuries alleged in the Amended Complaint would have been too "speculative" to provide the basis for an earlier claim. Opp. at 7-9. Like plaintiffs' other arguments, this one is totally divorced from the Amended Complaint, which identifies no recently incurred injuries or damages that (a) were speculative up until the date four years before this case was filed and (b) ceased to be speculative thereafter. Plaintiffs' argument is similarly divorced from the governing Ninth Circuit law on this point: "The question of whether there is a right to recovery is not to be confused with the difficulty in ascertaining the scope or extent of the injury." *Grimmett*, 75 F.3d at 517 (citation omitted); *see also In re Multidistrict Vehicle Air Pollution Litig.*, 591 F.2d 68, 73 (9th Cir. 1979) (distinguishing between "uncertain damage" and "uncertain *extent* of damage") (emphasis added). Here, the Amended Complaint clearly alleges that plaintiffs knew long ago that they had suffered at least some business injury and damages; an assertion that the full *extent* of their damages was unknown at that time (an allegation that does not, in fact, appear in the Amended Complaint) would not toll the statute of limitations.

2. Plaintiffs Fail to Allege Any Injury to Their Business or Property That Was Proximately Caused by a RICO Violation.

Plaintiffs offer no meaningful response to defendants' showing that the Amended Complaint contains no allegations that, if proved, would establish that RICO violations proximately caused their alleged "business" injuries. They point to not a single such allegation in the Amended Complaint; nor do they make any effort to rebut defendants' detailed discussion of the specific allegations of injury and causation that are presented – and not presented – for each plaintiff. *See* Mot. at 6-10. For example, plaintiffs make no effort to explain how the Indianapolis Colts' decision not to re-sign plaintiff Goode "out of fear of his inability to play the following season" after a neck injury (AC ¶ 233) was proximately caused by RICO predicate acts. Nor do they explain how plaintiff Evans, who alleges no injury to business or property at all, could possibly have a RICO claim.

Instead of addressing these deficiencies in their Amended Complaint, plaintiffs offer two general arguments that are both largely beside the point and wrong as a matter of law. First, they assert that they

were only required to allege that their injuries were caused by the defendants' "scheme." Opp. at 18. If this is intended to suggest that they need not allege that their injuries were caused by RICO predicate acts, that is simply wrong, as the Supreme Court has made clear. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985) (a compensable RICO injury is "the harm caused by predicate acts sufficiently related to constitute a pattern . . . . Any recoverable damages . . . will flow from the commission of the predicate acts."). Here, plaintiffs have failed to allege that their alleged business injuries were proximately caused by *any* predicate acts of racketeering.

Plaintiffs' second argument – that allegations of mail and wire fraud do not have to be pled with particularity and need not involve any actual fraud in connection with use of the mails or telecommunications – is beside the point.[3] The Amended Complaint contains no hint that any of the RICO plaintiffs suffered a business injury proximately caused by acts of mail or wire fraud. Plaintiffs' argument that such acts – none of which is pled with particularity – might have somehow made possible the conduct that injured them (in ways that neither the Opposition nor the Amended Complaint explains) is simply an assertion of bare "but for" causation that, as the Supreme Court has explicitly held, cannot support a RICO claim. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68 (1992) (civil RICO requires proximate causation, "[a] direct relation between the injury asserted and the injurious conduct alleged," and not merely "but for" causation).

3. The Amended Complaint Does Not Plead Facts Sufficient to Establish a RICO Conspiracy.

Plaintiffs argue that their pleading of a RICO conspiracy is sufficient because it is implausible to believe that "hundreds" of doctors, trainers, and executives from "all thirty-two Clubs, independently

[3] It is also wrong. Mail and wire fraud must be pled with particularity. *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 557-58 (9th Cir. 2010). Although a plaintiff may in limited circumstances be excused from pleading details known to the defendant and of which the plaintiff has no knowledge, a party is "expected to have personal knowledge" of calls in which he participated or mailings he received that form the basis of his mail and wire fraud claims. *Id.* at 558-59 (citation omitted). No such communications are identified here; nor do plaintiffs allege any use (let alone any specific use) of the mails or telecommunications to "execute" any fraud against them. *See Schmuck v. United States*, 489 U.S. 705, 712 (1989).

and coincidentally agreed to violate federal law" over a course of fifty years. Opp. at 9; *see also id.* at 16. This argument is circular, as there are no factual allegations in the Amended Complaint that, if proved, would establish that "hundreds" of doctors, trainers, and executives of all of the NFL clubs "agreed" to violate – or did violate – the federal laws upon which plaintiffs' RICO claim is based. This assertion simply derives from the conclusory allegation that all clubs participated in a conspiracy.

The Amended Complaint offers no factual allegations to support the conclusion that *any* of the defendants – much less all of them – "agreed" to participate in a conspiracy to violate RICO.[4] Plaintiffs do allege isolated acts that they contend violated technical requirements of the Controlled Substances Act, such as instances in which medications were administered on airplanes or in visiting locker rooms rather than at a club's home facility. *See* AC ¶ 303. But even these allegations relate to only a subset of the club defendants; for several defendants the Amended Complaint identifies *not a single predicate act* that would support a RICO claim.[5]

Thus, plaintiffs' argument – that a conspiracy has been adequately alleged because they have alleged that all of the defendants engaged in similar predicate acts – fails on its own terms. And even if such parallel conduct by all defendants *had* been alleged, that would fall far short of satisfying the pleading standard for conspiracy established by the Supreme Court and the Ninth Circuit. *See* Mot. at 10-12 (discussing cases). Mere parallel conduct – even parallel conduct that allegedly violates the law – does not establish a conspiracy.

Most of the remainder of plaintiffs' discussion of this issue addresses this Court's decision in *B & R Supermarket, Inc. v. Visa, Inc.*, 2016 WL 5725010 (N.D. Cal. Sept. 30, 2016). In fact, the Court's analysis in that case, which carefully tracks the Supreme Court and Ninth Circuit authority that defendants have cited, mandates dismissal of plaintiffs' conspiracy claims here.

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[4] A RICO conspiracy claim requires a showing of assent to the conspiracy by each and every defendant. *See Baumer v. Pachl*, 8 F.3d 1341, 1346 (9th Cir. 1993).

[5] Throughout its discussion of this issue, the Opposition conflates the general allegations offered in support of plaintiffs' common-law tort claims – which are themselves almost entirely conclusory – with the limited allegations of actions that allegedly violated the federal criminal statutes that support a RICO claim. The latter allegations do not even mention several of the defendants.

B & R Supermarket involved the simultaneous adoption of new rules by four credit-card networks and the subsequent compliance with those rules by the networks' bank members. The question before the Court was whether the plaintiffs had pled facts sufficient to demonstrate that these actions occurred pursuant to a conspiracy; it answered in the affirmative as to the networks and in the negative as to the banks. The Court explained that to plead a conspiracy, the plaintiffs had to plead facts establishing, in addition to parallel conduct, "plus factors" that identify "'economic actions and outcomes *that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action*.'" *Id.* at *5 (quoting *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194 (9th Cir. 2015) (emphasis added). Plaintiffs' discussion of "plus factors" ignores this critical threshold requirement.

Plaintiffs have identified no facts suggesting that any of the defendants' actions that they challenge were "largely inconsistent with unilateral conduct." The overarching theory of the complaint – that defendants improperly medicated players in order to get their best performers back on the field – is *at least* as consistent with unilateral conduct as with any conspiracy. Under plaintiffs' own theory, each club was advantaged by pushing its players back onto the field, and any club that elected instead to keep injured players off the field and to offer up inferior replacements (with corresponding losses in fan interest and profits) would be at a competitive *disadvantage*.[6] The contrast with the situation in *B & R Supermarket* is stark. In that case, the networks needed to agree to issue their new rules at the same time because any network that did *not* do so would immediately capture business from its competitors, gaining an immediate competitive *advantage*. 2016 WL 5725010, at *8. This fact made the inference of a conspiracy plausible.

[6] Plaintiffs' suggestion (Opp. at 13-14) that, in the absence of a conspiracy, a decision by one club to overmedicate its players would meet with objections from other clubs begs the question. The Amended Complaint does not allege that the actions of any club in medicating its players were known to anyone outside that club. In any event, this argument completely misses the point of *Musical Instruments*. Facts indicative of a conspiracy must show that the alleged conspirators would be expected to act differently in the absence of a conspiracy, not that a party that did act differently would complain.

Plaintiffs' effort to draw parallels with the "plus factors" discussed in *B & R Supermarket* thus relies on a false premise – that a rote recitation of such factors can adequately allege a conspiracy without regard to whether they support a conclusion that the alleged conspirators would have acted differently in the absence of a conspiracy. Indeed, plaintiffs ignore this Court's cautions about the care with which such factors must be considered. As the Court pointed out, for example, a motive to increase profits or a mere "opportunity" to collude are not, in and of themselves, indicative of conspiracy. *Id.* at *7; *see also id.* at *8 (observing that "mere participation in trade-organization meetings does not alone suggest an illegal agreement," citing *Musical Instruments*, 798 F.3d at 1196).

This Court's decision to dismiss the conspiracy claims against the bank defendants in *B & R Supermarket* highlights another flaw in plaintiffs' pleading of conspiracy here. The Court found the conspiracy allegations against the banks to be inadequate because, *inter alia*, the plaintiffs had failed to identify exactly what the banks had agreed to do. *Id.* at *10. Similarly here, the Amended Complaint fails to allege exactly what the defendants agreed to do; it certainly does not allege that they agreed to commit unlawful acts that would violate RICO. None of the disparate and scattered acts that the Amended Complaint identifies as potential RICO predicate acts are alleged to have been coordinated, pre-agreed, or even related to one another. The RICO conspiracy allegations should be dismissed.

4. In the Absence of a RICO Conspiracy Claim, the Amended Complaint Pleads No RICO Claim at All Against the Majority of Defendants.

Defendants demonstrated in their Motion (at 13-14) that, if the RICO conspiracy claim fails, then no RICO claim at all has been pled against those defendants (the majority) that had no conceivable direct responsibility for the RICO plaintiffs' alleged business injuries. Plaintiffs do not dispute this simple and straightforward proposition.[7]

[7] The Opposition misconstrues this argument as asserting that, even if plaintiffs *could* establish a conspiracy claim, defendants that were not directly responsible for plaintiffs' injuries could not be held liable. *See* Opp. at 16-17. Defendants' Motion presented no such argument.

B. Plaintiffs' State-Law Claims Should Be Dismissed.

Plaintiffs begin the discussion of their state-law claims by asserting that those claims are governed by the law of Maryland, where this case was initially filed. Opp. at 22. Maryland *choice of law* rules apply in this case, but under those rules the governing *substantive* law is that of the location where the injury occurs. *See, e.g.*, *Uppgren v. Executive Aviation Servs., Inc.*, 326 F. Supp. 709, 711-12 (D. Md. 1971). Ultimately, however, this question is irrelevant here because Maryland substantive law on the particular issues raised in this Motion does not differ from that of the other states whose laws are cited in the Motion. *See, e.g.*, Mot. at 15 n.12, 16 n.13. Plaintiffs do not contend that it does. Plaintiffs' other arguments concerning their state-law claims have no greater merit.

1. Rule 12(g) Does Not Bar Defendants' Challenge to the State-Law Claims.

Plaintiffs argue that the Court should refuse to consider defendants' challenges to the intentional misrepresentation and civil conspiracy claims because those challenges were not asserted in the motion to dismiss their original complaint. Opp. at 22-24.[8] Plaintiffs cite cases construing Rule 12(g)(2), which bars successive motions to dismiss under Rule 12(b)(6), as applying to motions directed at amended pleadings as well as seriatim motions to dismiss the same pleading. There is a split of authority on that point, and defendants cited contrary authority in their Motion (at 4 n.3). Defendants submit that their authority on this point is better reasoned, but the Court need not resolve that question, as there is plentiful authority holding that a district court may exercise its discretion to entertain a second motion under Rule 12(b)(6) where, as here, doing so furthers the interests of judicial economy.[9] Moreover, Rule 12(h) explicitly excludes from the scope of Rule 12(g)(2) motions for judgment on the pleadings under Rule 12(c). *See* Fed. R. Civ. P. 12(h); *Cover*, 2016 WL 520991, at *4. Accordingly, if the Court determines that any issue presented in this Motion may not be considered under Rule 12(b)(6), that issue

[8] Plaintiffs do not assert this argument as to their common-law claim for "concealment" or their RICO claim, both of which appeared for the first time in the Amended Complaint.

[9] *See, e.g.*, *Cover v. Windsor Surry Co.*, 2016 WL 520991, at *4 (N.D. Cal. Feb. 10, 2016); *Banko v. Apple, Inc.*, 2013 WL 6623913, at *2 (N.D. Cal. Dec. 16, 2013); *Amaretto Ranch Breedables, LLC v. Ozimals, Inc.*, 2011 WL 2690437, at *2 n.1 (N.D. Cal. July 8, 2011).

should instead be addressed under Rule 12(c), under which the same substantive standards apply. *See Cafasso, United States ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054-55 & n.4 (9th Cir. 2011).

2. Plaintiffs' Misrepresentation and Concealment Claims Do Not Satisfy Rule 9(b).

Plaintiffs make no serious effort to demonstrate that their factual allegations satisfy the Rule 9(b) requirement that intentional misrepresentation and concealment claims be pled with particularity. *See* Mot. at 16-18. Instead, plaintiffs cite only generalized, conclusory allegations that are deficient as a matter of law.

As one example, plaintiffs suggest (Opp. at 27) that describing the "when" of the alleged fraudulent acts as the entire multi-year length of a plaintiff's employment in the NFL satisfies the particularity standard; that is incorrect. *See, e.g.*, *Davies v. Broadcom Corp.*, 130 F. Supp. 3d 1343, 1351 (C.D. Cal. 2015) (allegations of injury "in or about 2012" and "in or about March 2014" insufficiently specific). More fundamentally, plaintiffs do not identify a single *factual* allegation in their Amended Complaint that a *specific* plaintiff relied on a *specific* misrepresentation or was influenced by concealment of *specific* material information. They cite only to generic boilerplate, such as an attorney-drafted shorthand of "here you go, take this and get out there" (Opp. at 27), that is not alleged to have actually been said to any plaintiff. This and similar insufficiencies are fatal to their claims.

Rather than pointing to allegations that would satisfy the well-established standard for pleading fraud, which they cannot do, plaintiffs argue that a lower standard – requiring even less specificity in some respects than is otherwise required for mere notice pleading under Rule 8 – should apply to their misrepresentation and concealment claims. Specifically, they argue (1) that they are excused from Rule 9(b) because the relevant information is in defendants' possession; (2) that allegations of omissions need not be pled with particularity; and (3) that reliance need not be pled at all and may simply be presumed. All three arguments are incorrect.

First, plaintiffs cannot excuse themselves from the requirements of Rule 9(b) simply by positing that defendants have information relevant to their claims. As a factual matter, that argument defies common sense – defendants do not have "full" or "more" knowledge about (a) what plaintiffs claim was

and was not said to each of them when a medication was administered, (b) what *specific* omitted information about each medication each plaintiff claims was material, and (c) whether – and on what basis – each plaintiff relied on any statement or action (or inaction) by defendants. In short, this is exactly the kind of case for which Rule 9(b) was designed – a case in which key facts on which the claims are based are necessarily in *plaintiffs'* possession and must be pled with particularity.

Plaintiffs' reliance on cases like *Comerica Bank v. McDonald*, 2006 WL 3365599, at *3 (N. D. Cal. Nov. 17, 2006) is misplaced. In *Comerica Bank*, the district court *dismissed* a fraud claim for lack of particularity under Rule 9(b). *Id.* ("general allegations of [defendant's] concealment . . . do not suffice for a fraudulent concealment claim"). While that court noted the possibility that the Rule 9(b) requirements could be relaxed "as to matters within the opposing party's knowledge," it held that the plaintiffs had failed to demonstrate that the specific information at issue was known only to the defendants. *Id.* (citation omitted); *see also Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993) ("[T]his exception does not nullify Rule 9(b)" and applies only to facts "peculiarly within the defendant's knowledge."). The same deficiency exists here.

Second, plaintiffs are incorrect in arguing that the requirements of Rule 9(b) do not apply to claims of fraudulent omissions. *See, e.g.*, *Bias v. Wells Fargo & Co.*, 942 F. Supp. 2d 915, 935 (N.D. Cal. 2013) ("Although Plaintiffs' allegations do allege a fraud based in part on omissions, a plaintiff must still plead such claim with particularity.") (citing *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009)). To be sure, as this Court has observed, "a plaintiff in a fraud by omission suit will not be able to specify the time, place, and specific content of an omission as precisely as would a plaintiff in a false representation claim." *Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1098–99 (N.D. Cal. 2007).[10] But that does not change the fundamental requirement to plead the non-disclosure with

[10] *Falk* itself is readily distinguishable from this case, as is *Graebner v. James*, 2012 WL 6156729 (N.D. Cal. Dec. 11, 2012), on which plaintiffs also rely. In both cases, the complaints identified *specific* material facts that were not disclosed; they also pled detailed facts setting forth the context in which each omission occurred and demonstrating the materiality of the omitted facts to specific purchase or other decisions by the plaintiffs that led to their injuries. *See Falk*, 496 F. Supp. 2d at 1092; *Graebner*, 2012 WL 6156729, at *1, 4. No such specific factual allegations have been made here.

particularity. *See, e.g.*, *Eisen v. Porsche Cars N. Am., Inc.*, 2012 WL 841019, at *3 (C.D. Cal. Feb. 22, 2012) (Rule 9(b) requires plaintiff to describe, for example, "the content of the omission and where the omitted information should or could have been revealed" (citation omitted)); *Bias*, 942 F. Supp. 2d at 935; *see also Falk*, 496 F. Supp. 2d at 1099 (detailing factual allegations about defendant's omissions); *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 1002 (N.D. Cal. 2009) (Rule 9(b) requirements apply to alleged omissions). Plaintiffs have made no effort to plead any alleged omission with particularity. They were plainly obligated to plead, for example, what "side effects" of medications each plaintiff claims were not disclosed to him, which of those allegedly non-disclosed "side effects" (if any) would have been material to his decision to take the medication, and whether those particular "side effects" are alleged to have injured him.

Finally, it is not true that reliance on omissions may simply be presumed. Plaintiffs seek to rely on California precedent for that proposition, but the California Supreme Court has held, in a case rejecting arguments similar to those presented by plaintiffs here, that nothing in its precedents "so much as hints that a plaintiff may plead a cause of action for deceit without alleging actual reliance." *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1095 (1993). Plaintiffs identify no authority that supports the proposition that reliance may simply be presumed or inferred in the absence of allegations establishing what the information at issue *was* and/or whether and how it was *material.* This Court's decision in *Nelson v. Matrixx Initiatives, Inc.* does not support plaintiffs' position; in that case, the named plaintiff pointed to extensive, specific omissions of facts that would have caused him not to use the challenged product. *See* 2012 WL 1831562, at *5 (N.D. Cal. May 18, 2012). Here, there are no factual allegations from which one could possibly infer that, if a given plaintiff had been told about specifically identified side effects of a particular medication, that information would have been material to his decision to take that medication and he would have declined to do so.

3. Plaintiffs' Civil Conspiracy Claim Fails as a Matter of Law.

Plaintiffs acknowledge that their civil conspiracy "claim" can be asserted for no broader purpose than extending to additional defendants potential liability for their affirmative misrepresentation and/or concealment claims. Opp. at 28. They do not dispute the case law cited by defendants holding that such

a cause of action is unavailable to pursue alleged violations of the Controlled Substances Act or Food, Drug & Cosmetic Act. *See* Mot. at 15.

Plaintiffs argue that their failure adequately to plead the existence of a conspiracy under the standard of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007), and its progeny does not matter for purposes of its civil conspiracy claim because they are only required to satisfy state, rather than federal, pleading requirements. That is wrong. *See Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017 (9th Cir. 2013) (applying *Twombly* standard to state law claim); *Kearns*, 567 F.3d at 1125 ("It is well-settled that the Federal Rules of Civil Procedure apply in federal court, . . . irrespective of whether the substantive law at issue is state or federal.") (citations omitted). And applying the proper *Twombly* standard, plaintiffs' allegations fall short as a matter of law. *See* pp. 6-9 above.

C. The Class Allegations Should Be Dismissed.

The Amended Complaint explicitly identifies the parties on whose behalf each claim is asserted. The *only* claim that is asserted for a proposed class is the RICO claim. *See* AC ¶ 9; *see also id.* at pp. 74, 89, 94, 99 (headings identifying on whose behalf each cause of action is asserted). Defendants accordingly pointed out in their Motion (at 14) that dismissal of the RICO claim should necessarily include striking the class allegations. Plaintiffs now say they wish to seek class certification for their state-law claims after all. Opp. at 22. This belated change of heart does not alter the explicit statements in the Amended Complaint establishing that *only* the RICO claim was asserted on a class basis. Nor can those clear statements be ignored based on an argument that language used elsewhere is arguably inconsistent.

This Court established a schedule for this case that required plaintiffs to finalize their pleading by no later than October 31, 2016. Plaintiffs have offered no good cause for deviating from this schedule. *See* Fed. R. Civ. P. 16(b)(4). A belated recognition of the weakness of their RICO claim – which implicitly underlies this latest change of position – would not satisfy that standard.

D. There Is No Basis for Granting Leave to Amend.

In their Motion, defendants demonstrated that there is no basis here to grant leave to amend and that the Amended Complaint should be dismissed with prejudice. Mot. at 22. Plaintiffs contest none of

that showing. The only mention of the subject in their Opposition is a passing suggestion that they should be permitted to amend their RICO claim. *See* Opp. at 20 & n.8. But plaintiffs do not even attempt to demonstrate good cause for such an amendment (the standard applicable at this stage); nor – even more importantly – do they identify any additional facts they would plead to cure the numerous deficiencies that have been identified. They do not even mention, much less contest, defendants' showing that discovery has confirmed they have no such additional facts to plead. The Amended Complaint should be dismissed with prejudice.

DATED: January 11, 2017

Respectfully submitted,

COVINGTON & BURLING LLP

By: /s/ Sonya D. Winner

Sonya D. Winner (Bar No. 200348)
swinner@cov.com
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111-5356
Telephone: (415) 591-6000
Facsimile: (415) 591-6091

Allen Ruby (Bar No. 47109)
allen.ruby@skadden.com
Jack P. DiCanio (Bar No. 138782)
jack.dicanio@skadden.com
SKADDEN, ARPS, SLATE,
MEAGHER, & FLOM LLP
525 University Avenue, Suite 1400
Palo Alto, CA 94301
Telephone: (650) 470-4660
Facsimile: (650) 798-6550

Attorneys for Defendants

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP, JUDGE

ETOPIA EVANS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	NO. C 16-01030 WHA
	)	
ARIZONA CARDINALS FOOTBALL CLUB, LLC, et al.,	)	
	)	San Francisco, California
Defendants.	)	
	)	
	)	

Thursday, January 26, 2017

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs:

SILVERMAN THOMPSON SLUTKIN WHITE, LLC
201 North Charles Street
26th Floor
Baltimore, Maryland 21201
BY: PHILLIP S. CLOSIUS, ESQ.

For Defendants:

COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, D.C. 20001-4956
BY: GREGG H. LEVY, ESQ.
and
COVINGTON & BURLING, LLP (SF)
One Front Street
Suite 3500
San Francisco, California 94111
BY: SONYA D. WINNER, ESQ.

Reported By: BELLE BALL, CSR 8785, CRR, RDR
Official Reporter, U.S. District Court

Thursday - January 26, 2017 **8:13 a.m.**

P R O C E E D I N G S

THE COURT: Now we go to the football case. Evans versus Arizona Cardinals, et cetera.

THE CLERK: The case number for the record is Civil 16-1030. Evans versus Arizona Cardinals, on for motion to dismiss.

Counsel, please state your appearances.

MR. LEVY: Good morning, Your Honor. Gregg Levy for the defendants.

MR. CLOSIUS: Good morning, Your Honor. Phil Closius for plaintiffs.

THE COURT: Okay. All right.

Anyone else want to make an appearance?

MS. WINNER: Oh, sure. Thank you, Your Honor. Sonya Winner for the defendants.

THE COURT: Thank you. Good morning.

So this is a motion to amend -- let's see, is it a motion to amend? Or a motion to dismiss the amendment?

MR. LEVY: It is a motion to dismiss the amended complaint, Your Honor.

THE COURT: All right. This is another one of those things where it will be too -- we need to do this efficiently, but you get to start, but we can't wade through all of this material. I have waded through it already, and I -- it would be inefficient to go through this item by item.

But why don't you make your main points you want to make sure that I haven't lost track of.

MR. LEVY: Fair enough. Thank you, Your Honor.

The centerpiece of plaintiffs' amended complaint is their RICO claim. And I would like to turn to that first.

THE COURT: Sure.

MR. LEVY: The RICO allegations, Your Honor, fail to state a claim for at least three reasons.

First, as evident on the face --

THE COURT: No, I -- I hate it when a lawyer does that. If you just give me one good reason, because that's all -- I'm going to go with just one good reason. If you have three good reasons, good for you, you can use those on appeal. But one good reason is enough in my book.

MR. LEVY: I have one very good reason, Your Honor.

THE COURT: The idea that I have to go through three reasons -- so give me your best reason on RICO.

MR. LEVY: I have one very good reason.

THE COURT: Let's hear that one.

MR. LEVY: The RICO claim is barred by the statute of limitations. The limitations period under RICO is four years, and that period begins to run when a plaintiff knew or should have known of an injury to his business or property.

That principle was settled by the Supreme Court in *Rotella v. Wood*, which held that discovery of the injury, not discovery

of the other elements of a RICO claim, is what starts the clock.

THE COURT: Wait a minute. Wait a minute. I want to make sure I have this. What's the name of that decision?

MR. LEVY: *Rotella v. Wood,* Supreme Court decision.

THE COURT: Injury to the business or property.

MR. LEVY: Yes.

THE COURT: Is that right? Is that what the Supreme Court said?

MR. LEVY: It holds, the quote I have (As read):

"Discovery of the injury, not discovery of the other elements..."

Excuse me.

"Discovery of the injury, not discovery of the other elements of a claim is what starts the clock."

And that's a RICO decision, Your Honor.

THE COURT: All right. Okay, go ahead.

MR. LEVY: Here, the face of the amended complaint, itself, demonstrates that each of the seven RICO plaintiffs knew of the alleged injury to his business or property, diminution of his earning capacity, and the ending of his playing career more than a decade before the complaint was filed.

There's no basis for an argument that the limitations period should be tolled because the alleged injury to any plaintiffs' business or property was latent. That argument is barred by *Rotella*.

Moreover, there's nothing latent about the end of a player's playing career. In this respect, plaintiffs' claims for injury to their business and property are fundamentally different from the common-law personal injury claims addressed by this Court earlier in the case.

Nor is there a basis for tolling the statute of limitations because of the doctrine of fraudulent concealment. Plaintiffs didn't plead fraudulent concealment. Under the Ninth Circuit's holdings in ***Rutledge***, ***Grimmett*** and ***Hexcel***, that should be the end of the matter. But here, plaintiffs didn't plead any of the required elements of fraudulent concealment.

The Ninth Circuit held in ***Guerrero v. Gates*** that in order to invoke the doctrine of fraudulent concealment, a plaintiff is required to allege affirmative conduct, conduct -- and I quote -- "above and beyond," close quote, the underlying fraud on which his claim is based, that acted to conceal the existence of his claim.

But plaintiffs didn't allege any affirmative acts by any defendant to mislead them about the existence of their claim.

Nor did the plaintiffs alleged that they lacked actual or constructive knowledge of the facts giving rise to their claim. The Ninth Circuit held in both ***Pincay*** and ***Guerrero*** that that was required.

And plaintiffs didn't allege that they had undertaken any diligence whatsoever to uncover the facts that give rise to

their claim, as required by the Ninth Circuit in *Volk*. Each failure is independently fatal to plaintiffs' effort to invoke the doctrine of fraudulent concealment.

The reason that plaintiffs didn't and could not plausibly alleged fraudulent concealment is also plain on the face of the amended complaint. Each plaintiff was fully aware at the time the events occurred not only of his injury, but also of the facts, the alleged predicate acts that allegedly give rise to his claim.

If a plaintiff was handed a pill from a club doctor or trainer on an airplane or in a visiting team locker room, he plainly was aware of that fact at the time it occurred. If a plaintiff was handed pills in unmarked envelopes, without prescriptions or disclosures, he plainly was aware of that at the time it occurred, as well.

Indeed, plaintiffs, themselves, argue that the challenged conduct occurred -- and I quote their opposition at Page 9, quote: "...in open violation of federal law." So even if fraudulent concealment had been alleged, their invocation for that doctrine would have failed at the threshold.

Nor is there any basis for plaintiffs' argument that the RICO limitations period was tolled because their injuries were too speculative to support a claim. This argument has no support, whatsoever, in the amended complaint. There are no allegations in the amended complaint -- none -- of injuries that

were speculative until four or five years ago, but actionable thereafter.

More important, in making this argument, plaintiffs ignore the key distinction emphasized by the Ninth Circuit in the *Grimmett* case. They're confusing uncertainty of damages -- uncertainty of damage -- that is, whether they were injured or not -- with uncertainty regarding the extent of their injury. As the Court of Appeals made clear in *Grimmett*, the latter does not bar a claim, and does not toll the limitations period.

Finally, the amended complaint does not include any allegation that would restart the limitation period. As the Ninth Circuit held in *Grimmett*, applying principles articulated by the Supreme Court in the *Zenith* case, to restart the limitations period -- and I quote (As read):

> "There must be a new and independent act that is not merely a reaffirmation of a previous act, and it must inflict new and accumulating injury on the plaintiff."

The amended complaint makes no such allegations. And it couldn't plausibly do so. All of the RICO plaintiffs are retired players. None has had relevant interactions with the defendant since his career ended over a day ago (sic).

Because they could have brought the same claims more than a decade ago, and more than a decade before the amended complaint was filed, plaintiffs' RICO claim should be barred, Your Honor.

THE COURT: Let's pause on that, just on RICO, for now. Let's hear from the other side on RICO.

MR. CLOSIUS: Your Honor, the defendants are correct in saying that the Ninth Circuit follows what is referred to as the injury discovery rule. It was promulgated in *Grimmett versus Brown*, and it was effectively affirmed by the Supreme Court in *Rotella versus Wood*.

But when they argue that the statute of limitations starts when the injury occurs -- that is, when the plaintiffs retired from football -- they are, in fact, arguing something that the cases and the law review articles referred to as the injury occurrence rule.

The injury occurrence rule was promulgated by Justice Scalia in *Klehr versus A.O. Smith*. It was a concurring opinion there, Your Honor, having only his vote and Justice Thomas. It was referred to in *Rotella versus Wood* in Footnote 4, where the Supreme Court in *Rotella* explicitly said that they were not accepting the injury occurrence rule.

In fact, no circuit has adopted the injury occurrence rule, that we know of, and the Ninth Circuit certainly has not.

THE COURT: Wait, wait, wait. So, Mr. Levy, right?

MR. LEVY: Yes, Your Honor.

THE COURT: You told me that *Rotella v. Wood* said there has to be injury to the business or property, and that is when the limitations begins to run.

MR. LEVY: Discovery of the injury. Right.

THE COURT: You're telling me that's not -- they rejected that rule.

MR. CLOSIUS: That is correct.

THE COURT: All right. So my law clerk is going to go get my 528 U.S.

MR. CLOSIUS: Your Honor --

THE COURT: I'm going to hand it down to you, and we're going to find out who's telling me truth. So we will just pause here for a minute.

MR. LEVY: Would you like me to hand the opinion up to you? I have it.

THE COURT: No, I'll be able to find it. I'm going to go get it, myself.

(A pause in the proceedings)

THE COURT: I'm going to hand down some 528 U.S. reports first to Mr. Levy, and you find me the part that you quote and that you believe or you are relying on when you told me that's what they held.

What is the plaintiff's name -- the counsel's name --

THE CLERK: Um, Closius.

MR. CLOSIUS: Closius.

THE COURT: Spell that.

MR. CLOSIUS: C-L-O-S-I-U-S.

THE COURT: Closius, all right. All right, show that to

counsel, to Mr. Closius.

MR. LEVY: The passage I'm showing to counsel, Your Honor, is on Page 555, the second paragraph, the latter half of the paragraph.

THE COURT: Let him read that, and then hand it up to me so I can read it.

(Request complied with by Mr. Levy)

MR. CLOSIUS: Okay.

THE COURT: Okay.

(Document handed up to the Court)

THE COURT: All right. 555, you say?

MR. LEVY: Yes, Your Honor.

THE COURT: It says "Opinion of the Court." By Justice Souter. Second paragraph?

MR. LEVY: Second paragraph, the second half of the paragraph beginning "But in applying..."

THE COURT: Well, that's about halfway down the paragraph, but (As read):

> "But in applying a discovery accrual rule, we have been at pains to explain that discovery of the injury, not discovery of the other elements of the claim, is what starts the clock. In the circumstance of a medical malpractice where the cry for a discovery rule is loudest, we have been emphatic that the justification for a discovery rule does not

extend beyond the injury."

And then there's a quotation. It goes on and on. And then Justice Souter resumes:

"A person suffering from an inadequate treatment is thus responsible for determining within the limitations period then running whether the inadequacy was malpractice."

Next paragraph:

"We see no good reason for accepting a lesser degree of responsibility on the part of a RICO plaintiff."

So, all right. So where is the part that seems to support what Counsel said?

Now, I'm going to hand this down to Mr. Closius. And you, you find what you want me to read.

(Document handed down)

MR. CLOSIUS: Footnote 2 (Indicating).

MR. LEVY: Okay.

(Document handed up to the Court)

MR. CLOSIUS: Footnote 2, Your Honor, on 554.

THE COURT: All right, I'm going to look at that right now. Footnote No. 2, which is on 554.

MR. CLOSIUS: Correct.

(The Court examines document)

THE COURT: This is hanging off a paragraph. I'll read the paragraph that it refers to first (As read):

> "The decision in *Klehr*..." K-L-E-H-R "...left two candidates favored by various courts of appeals: Some form of the injury discovery rule, preferred by a majority of circuits to have considered it, and the injury and pattern discovery rule. Today, guided by principles enunciated in *Klehr*, we eliminate the latter. Footnote No. 2. We do not, however, settle upon a final rule. In addition to the possibilities entertained in the courts of appeals, Justice Scalia has espoused an injury occurrence rule under which discovery would be irrelevant. And our decision in *Klehr* leaves open the possibility of a straight injury occurrence rule. Amicus American Council of Life Insurance urges us to adopt this injury occurrence rule in this case, but the parties have not focused on this option, and we would not pass on it without more attentive advocacy."

Well, I need the help of the lawyers. On the one hand, the text seems to say that there is going -- that RICO does have a discovery rule. And then Footnote 2 seems to say they're not adopting some form of the rule.

So let me -- I need --

MR. CLOSIUS: Your Honor --

THE COURT: Wait, before you -- let's hear what Mr. Levy says, and then you're going to get to give me your

reconciliation.

All right.

MR. LEVY: First, Your Honor, the articulation of the rule in the text is clear. That's the rule as it has been followed consistently by the Ninth Circuit, and by District Court cases, including the *Grimmett* case --

THE COURT: You're not helping me any. How do you reconcile -- what are they talking about then in Footnote 2?

MR. LEVY: They're raising the question of whether the -- for RICO claims, the requirement that the injury be discovered by the plaintiff during -- to start the limitations period be eliminated.

And the net result of doing that, Your Honor, would be essentially to extend the limitations period indefinitely. If the plaintiff knew of his injury, and sat on his rights, and didn't sue within the limitations period, then under Mr. Closius's interpretation of that footnote, then there would be no statute of limitations bar at all. And all of the reasons that the Court --

THE COURT: Well, what does -- what is the injury occurrence rule?

(Off-the-Record discussion between counsel)

THE COURT: Meaning, fact of injury, irrespective of whether or not it was discovered?

MR. LEVY: Sorry. Your Honor, the injury -- as I understand

it, they're suggesting that you don't have to discover the injury at all.

THE COURT: Well --

MR. LEVY: Your Honor, if the discovery of the injury --

THE COURT: But the Supreme Court said discovery -- in the text at 555, it does say there is a discovery rule. So it's not the -- the strict occurrence. It's the -- there has to be an injury, and it has to be discovered by the plaintiff.

Right? Isn't that what they're saying?

MR. LEVY: Discovered or should have been discovered. And as we've suggested, it's hard to argue that in this circumstance, that any of these plaintiffs failed to discover their injury more than a decade ago, when their playing careers ended, in their view, prematurely, and their earning capacity was, as a result, diminished.

THE COURT: All right. So, what do you say, Mr. Closius, is -- it does seem like the opinion of the Court adopts a discovery rule. And what they're talking about in the footnote is an actual occurrence of injury, irrespective of whether or not it has been discovered. But the defense motion is not relying upon that. They are relying upon discovery, and saying it was discovered in this case.

So, what am I missing here? Tell me what point you were trying to make.

MR. CLOSIUS: Your Honor, what you are missing are the Ninth

Circuit cases, law review articles, and the other various pieces of legal analysis that have looked at this. *Rotella* --

THE COURT: Wait. This is important to me. Give me the first of those decisions.

MR. CLOSIUS: *Rotella versus United States*, which is a case we're looking at, was dealing with the injury --

THE COURT: *Rotella v. Wood*, wasn't it?

MR. CLOSIUS: *Rotella v. Wood*, I'm sorry -- was dealing with the injury pattern act. And what they held was the statute started before they knew of the elements of the RICO claim. That's the holding in *Rotella*. Right? That that rule does not work. They left the injury discovery rule alone.

The injury discovery rule in the Ninth Circuit, the clock starts when the injury has happened and plaintiff knows that there is wrongful action by the defendant that started the injury. That's the injury discovery rule in the Ninth Circuit.

Your Honor --

THE COURT: Wait. Where does it say -- which decision says that? What's your best decision on that?

MR. CLOSIUS: The best decision on that is Judge Ware in the Northern District of California, in the case of *Ward versus* --

THE COURT: That's a District Court. I need a Court of Appeals decision.

MR. CLOSIUS: Your Honor, that was the most recent and the most explicit I can get to.

In *Rotella*, itself, they stipulated that the defendant -- that the plaintiff knew when he left the hospital that the doctor had done something wrong.

In *Grimmett*, the wife -- the Court specifically held that the wife knew that the defendant had defrauded her years before, during a bankruptcy proceeding.

In *Pincay* versus -- these are all Ninth Circuit cases, all quoted by the defendant, Your Honor. In *Pincay versus Andrews*, the Court went out of its way to say that the plaintiff knew of the defendant's wrongdoing --

THE COURT: What is it, then, that these plaintiffs in your case, what is it that they did not know back when their careers ended? What was -- what more did they need know?

MR. CLOSIUS: They had no idea that they were being terminated because of wrongful action by the defendant. They thought -- as Judge Ware said in *Ward*, they thought that the decision to not continue their careers was based on a business decision.

And *Ward versus Chanana* is clear in saying the plaintiff has to know that the action was somehow caused by the wrongful conduct of the defendant before the statute starts to run.

Again, *Hexcel*, same thing. They knew for years before.

Crown versus Chevy, they knew that the -- Chevy had breached a side agreement years before.

Your Honor, you cannot hold that a statute starts to run

before the defendant (sic) has any idea that there was a wrongful activity by the defendant. That's basic due process.

And every case they have cited from the Ninth Circuit essentially says that. Every one of them goes out of their way to cite that the defendant knew of wrongful action -- I'm sorry -- the plaintiff knew of wrongful action by the defendant, it's at that moment --

THE COURT: I just don't see how you can say that. The Supreme Court says "In circumstance" -- and they use medical malpractice here (As read):

> "In circumstance of medical malpractice where the cry for a discovery rule is the loudest, we have been emphatic that the justification for a discovery rule does not extend beyond the injury."

So they're exactly rejecting your proposition. Somebody -- somebody wakes up in the hospital, and they decide after a few days that they are still sick. Or something happened, but they don't know for sure that there's been any malpractice. Nevertheless, the clock starts to run.

And the theory is, the policy argument is that: Okay, the clock is starting to run; you've got time to investigate. If you think that there has been a wrong committed, you've got a few years to figure it out and bring your lawsuit. But you don't get to just sit back and wait, once you know there's been an injury. That's what the Supreme Court's telling us.

MR. CLOSIUS: Your Honor, the analogy to medical malpractice isn't appropriate here. In --

THE COURT: But, but the Supreme Court said it was appropriate. That's what they borrowed from. They say: We see no good reason for accepting a lesser degree of responsibility on the part of a RICO plaintiff.

MR. CLOSIUS: Because in medical malpractice, you know within the four-year period or whatever the period is, that something has gone wrong with your surgery, with whatever it is, and that, in fact, your doctor either made a mistake or didn't.

Right? So you know --

THE COURT: You don't know that. That's the whole point. You don't know that in medical malpractice. It could just be that the doctor was perfectly good, but there's the risks of surgery. So they turn out not to -- you know, their back still hurts. But they don't know that there's been malpractice yet.

I don't -- to me, they're saying here -- they're saying you've got a certain period of time, once you know you've been injured, to figure out who is at fault and then bring your lawsuit. You can't just wait for 20 years, and then decide you're going to figure it out.

MR. CLOSIUS: Your Honor, I guess all I can say in response is -- is that six Ninth Circuit cases and the District Court was wrong.

THE COURT: When you say "Ninth Circuit," do you mean the

Court of Appeals?

MR. CLOSIUS: I mean the Court of Appeals, the Ninth Circuit. The only District Court case I've cited to is *Ward versus Chanana*.

THE COURT: Well, give me the Court of Appeals decision after *Rotella v. Wood* that you think is best for your point.

MR. CLOSIUS: *Pincay versus Andrews*, Your Honor.

THE COURT: What's the cite? So my law clerk will go get it right now.

MR. CLOSIUS: 238 F.3d, 1106.

THE COURT: Please go get that.

MR. CLOSIUS: *Ward* is the best cite, but you want Court of Appeals, correct?

THE COURT: I want the Court of Appeals, yeah. We're going to find out. What was the year of that decision?

MR. CLOSIUS: 2001.

THE COURT: Does it cite to *Rotella v. Wood*?

MR. CLOSIUS: I'm sorry?

THE COURT: I'm just curious. Does it cite to *Rotella v. Wood*?

MR. CLOSIUS: I don't remember, Your Honor.

THE COURT: And distinguish it?

MR. CLOSIUS: I believe so.

THE COURT: Tell me what the fact pattern was in that case.

MR. CLOSIUS: The fact pattern in *Pincay* was that Pincay was

a jockey who brought a lawsuit against his investment advisors, claiming that he had an agreement to -- to -- that their maximum fee would be five percent. He found out later that they had discharged him much more than the five percent. And he brought a lawsuit to recover the difference, in essence.

THE COURT: Okay, hang on now. I've got the book. Give me the page to look at.

MR. CLOSIUS: 1106.

THE COURT: What? What page?

MR. CLOSIUS: 1106.

THE COURT: All right.

MR. CLOSIUS: Sorry.

THE COURT: *Pincay v. Andrews*, 238 F.3d, 1106.

Okay, it looks like a RICO case. And what particular page do I look at?

MR. CLOSIUS: Your Honor, on 1110.

THE COURT: All right, starting at the top (As read):

"The injury alleged by Pincay..."

MR. CLOSIUS: Right.

THE COURT: Et cetera...

"...was the act of paying more than the 5 percent of the yearly income to the Andrews. The plaintiff is deemed to have constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to the

discovery of the fraud. It is..."

MR. CLOSIUS: Not the injury, Your Honor. Reasonable information that would lead them to discovery of the fraud. If you read the rest of the paragraph --

THE COURT: All right, I'm going to read it right now.

MR. CLOSIUS: Okay.

THE COURT: (As read)

"It is hard to imagine what would constitute enough information to warrant an investigation, if receiving a written disclosure of one's purported injury does not. As just one example of the many instances in which Pincay and McCarron received written disclosure of their injury, Pincay and McCarron both signed a document in 1980 disclosing that Robert will receive compensation from the venture in the amount of 5 percent of the capital contribution..."

Et cetera, et cetera.

"Clearly, as of 1980, both Pincay and McCarron had enough information to warrant an investigation into whether the ventures in which they were investing would result in more than 5 percent of their annual income finding its way into the wallets of Andrews. Indeed, in *Volk*, we held as a matter of law that receiving written discovery of the possibility of injury was sufficient to put a civil RICO plaintiff

> on constructive notice of his injury. We follow *Volk* and hold that as a matter of law, Pincay and McCarron received constructive notice of their injuries at least as early as 1980. Thus, unless the statute of limitation was tolled, Pincay and McCarron's civil RICO claims are time-barred."

All right. So which is the part of this -- is there something I'm missing? This seems to go against your position.

MR. CLOSIUS: Your Honor, they're saying they have to have sufficient knowledge of the fraud, not the injury. The fraud is the defendant's wrongful activity. If it was the injury, they wouldn't have to do anything. The injury occurred.

THE COURT: No, knowledge -- knowledge -- they say here, they had enough information to warrant an investigation.

MR. CLOSIUS: To discover the fraud.

THE COURT: So how does that help your position?

MR. CLOSIUS: Because the fraud is the wrongful conduct of the defendant. That's why they were on notice. Because they should have known the defendant was doing something wrong.

If counsel for defense is right, there's no reason to get into that they had letters, that they had information. The injury would have occurred when they paid the excess fee. The fact that they're looking into all this other stuff -- the notices they had, the records they'd gotten, the communications from it -- is evidence of wrongful conduct by the defendant.

There would be no reason to look into any of that if the defendant's rule were right. Because the second the injury happened, the second they paid the money to Andrews, that was it.

The Court goes out of their way to say: To warrant an investigation which would discover the fraud. That's exactly the point that Judge Ware in ***Ward*** made up -- followed. That's also in ***Crown versus Chevy***, where they talked about you had to have knowledge of the fraud or the wrongdoing by the defendant. That's a Court of Appeals case. They cite ***Volk*** as their support. ***Volk*** saying, again, that they looked at not just the injury when it happened, but they looked at the letters and the annual reports which should have put them on constructive notice of the wrongful conduct by the defendant.

Again, this is --

THE COURT: All right. What does the defense say to this?

MR. LEVY: Your Honor, I would invite your attention to a paragraph that Mr. Closius just skipped over. I believe it is the top paragraph on Page 1109.

THE COURT: Okay. Go ahead.

MR. LEVY: And it reads, quote (As read):

> "We have continuously followed the injury discovery statute of limitations rule for civil RICO claims..."

Citing ***Grimmett v. Brown***, which I would commend to Your Honor is a very persuasive opinion on this point.

Going on:

"Under this rule, the civil RICO limitations period begins to run when a plaintiff knows or should know of the injury that underlies his cause of action."

"Of the injury."

"Thus, the injury discovery rule creates a disjunctive two-prong test of actual or constructive notice under which the statute begins running under either prong."

There is no ambiguity about that, Your Honor. It refers to the --

THE COURT: What do you say to Mr. Closius's point that on 1110, the -- the quotation about having enough information to warrant an investigation? So why is that phrase in there if -- explain that.

MR. LEVY: Well, because one of the obligations imposed on the plaintiff in a circumstance where he becomes aware of his injury is to engage in due diligence. If he fails to engage in due diligence, then his claim is barred.

Here, we have a situation where the plaintiff is aware both of the injury -- there can be really no dispute about that -- and of the conduct on which is -- that was the alleged cause of his injury.

As I noted in my remarks earlier, even the plaintiffs allege that the predicate acts upon which their claims are based were

conducted in what they call open violation or open defiance of federal law.

THE COURT: All right. We've got to move on.

What's your next major point you want to bring up on your motion to dismiss?

MR. LEVY: Your Honor, if you want me to -- are we done with RICO? Or may I --

THE COURT: We've got to move on.

MR. LEVY: Okay. Misrepresentation on the concealment claims, Your Honor. Those state-law claims are both claims for fraud, for each Rule 9(b) requires particularized allegations of reliance and proximate cause, among other things. But there no such particularized allegations here.

In fact, by pleading boilerplate -- identical boilerplate for each plaintiff, the amended complaint, on its face, demonstrates that its allegations of reliance and causation in particular are empty.

Let me explain what I mean by that. No plaintiff alleges what the doctors or trainers should have disclosed to him at the time of the alleged non-disclosure.

No plaintiff alleges that such a disclosure, if it had been made, would have affected in any way his decision-making whether to take the medication, whether to play, or whether to make any other changes in his life.

No plaintiff alleges how his conduct would have been

different if such a disclosure had been made.

And no plaintiff alleges any causal link between the absence of a disclosure and his alleged business injury.

Rule 9(b) undeniably requires much more.

On the issues of causation and reliance, plaintiffs don't even satisfy the minimal pleading requirements of Rule 8. And without such allegations, this case is nothing more than a negligence case, with plaintiffs complaining about the quality of their care.

Your Honor, plaintiffs and their counsel have now had multiple bites at the pleading apple. This case is well into discovery. Plaintiffs' class certification motion, if it survives this motion -- and I suggest it should not, because the only class allegations are -- class allegations are brought only with respect to the RICO claim. But, that motion would be due in less than a month. They've already had two pleading opportunities in this case.

In my view, dismissal with prejudice is therefore appropriate. The claims for intentional misrepresentation and concealment, like their RICO claims and the associated class action allegations, should be dismissed with prejudice.

THE COURT: Well, all right.

Mr. Closius, I want to focus -- you have a lawsuit here against 32 teams. This is not a class action yet. And at this stage, I have to assess each individual defendant, and ask the

question: Has the complaint alleged a claim for relief against that particular team?

So I want to focus on the Chicago Bears. And I want you to show me in the complaint the specific 9(b) qualified allegations that show what the Chicago -- where the Chicago Bears did specific acts that didn't live up to what they allegedly claimed they would do. I don't think it's in there. I don't think you have it for a number of teams. But I'm using the Chicago Bears as an example. Maybe you do have it for some teams. But you've got to do it for 32 teams. There is no such thing as group liable here. You've got to do it for every single person you sue.

So I'm giving you chance now to focus on the Chicago Bears. And I have the complaint here. I'm willing to let you walk me through, and show me where it is that you make your case against the Chicago Bears.

MR. CLOSIUS: Your Honor, to be specific, the Chicago Bears, if I understand what you're talking about, I don't think it's in the complaint.

THE COURT: Yeah, I don't think it is, either.

MR. CLOSIUS: But --

THE COURT: So how can you -- look. Let me just give you an example.

Let's say that 32 members, friends of yours, got sued. And the plaintiff was able to make out a case against, say, one

person or three people. And then the other -- can we just roll the other 28 or -9 into the case because somehow there's a claim made out against one team? I think you've got to do it against every single team.

MR. CLOSIUS: Your Honor, if I might explain our theory that is in the amendment.

THE COURT: Uh-huh.

MR. CLOSIUS: The problem in this case that underlies it is not a drug, a pill. It's the volume of drugs. It's the volume of drugs that are given to the players. The volume necessitates a violation of the Controlled Substance Act. Because they can't get the volume without it.

We have players --

THE COURT: This is not brought on the basis of the Controlled Substances Act.

MR. CLOSIUS: Yes, it is, Your Honor.

THE COURT: What are you talking about?

MR. CLOSIUS: That's the basis, as a predicate act, in the RICO claim, Your Honor.

THE COURT: Well, what if RICO goes out? Right now I'm just talking about the state-law claims --

MR. CLOSIUS: The state-law claim are based on misrepresentations because they didn't give the procedures that have to be followed under the Controlled Substance Act, and under the Food, Drug and Cosmetics Act. Right?

So the things they didn't do were statutorily required of them to do. Give warnings to side effects, labels. Prescriptions. All of that. It's listed in the complaint.

All 32 teams are involved because it's the away teams; it's the home teams. I mean, at one point, they made an argument that's only allowed to six claims to six teams in the RICO claim, Your Honor. That doesn't understand RICO. Right? It's an enterprise.

Same thing with the state-law claim. When we have a player, right, he plays on a certain number of teams. But all the teams he played against are also complicit in distributing the drug to that player. When you go --

THE COURT: I don't get that. How can you -- look. It's entirely conceivable to me that notwithstanding your -- your distrust of the entire league, it's entirely conceivable to me that you have a team that is a good citizen, that obeys all of the laws, and that treats its players right. And maybe even if some other teams don't.

And so I don't think it's enough to say it's the volume. I think you've got to show where the Chicago Bears violated the Controlled Substances Act, and show specifics under Rule 9(b) to show that they are the bad actors that you say the whole league is.

Now, maybe you have done that for some teams. But this is not group liable. This is -- this is -- you are suing 32

defendants, each one of which has the right to have their day in court, and to say: Prove it. I mean, meet Rule 9(b) before we have to stand to answer.

That's what they're saying.

MR. CLOSIUS: Your Honor, the defendant is giving the impression that 9(b) controls everything in the complaint. That's not true. 9(b) --

THE COURT: I agree with that. You're right about that.

MR. CLOSIUS: All the omissions -- the guts of the case are the omissions. That's not 9(b). That's Rule 8. *That's Twombly*.

THE COURT: But where is it, where are the specific instances where pills were given to somebody by the Chicago Bears on a given season or a given day at a given game, and they violated some omission?

MR. CLOSIUS: Your Honor --

THE COURT: You don't have it in there.

MR. CLOSIUS: Your Honor, we will now -- I'll walk you through it.

THE COURT: For all we know, the Chicago Bears did it right, according to this complaint.

All right, show me. I'm willing to -- take your time right now. Let's go through you allegation. I've got your amended complaint right here.

MR. CLOSIUS: Paragraph 303, on Page 80.

THE COURT: Okay. 303.

MR. CLOSIUS: Page 80.

THE COURT: Right.

MR. CLOSIUS: That's two and a half pages of names, dates, and where.

So if you go -- if you go on the fifth line -- sorry I forgot this -- the Chicago Bears are listed right, Jeff Graham, on September 23rd, 1995:

"Trainers provided Mr. Graham with Ambien in St. Louis."

THE COURT: Hang on a minute.

"For the purpose of executing the Scheme..."

All right. So then you have a chart, and it has Chicago Bears.

MR. CLOSIUS: Team, player, date, and drug.

THE COURT: All right, let's look at it. Says "Chicago Bears, Jeff Graham." Is he a plaintiff?

MR. CLOSIUS: Yes.

THE COURT: Okay. On 1995.

MR. CLOSIUS: September 23rd.

THE COURT: He received --

"Trainers provided Mr. Graham with Ambien in St. Louis."

All right, what -- is that good enough? To just say that?

MR. CLOSIUS: The trainers giving out a controlled substance

is a violation of the Controlled Substance Act. And the fact they traveled with it to Saint Louis is a violation of the Controlled Substance Act. That's made in the previous pages.

THE COURT: Help me connect the dots. I want to see where -- where does that --

MR. CLOSIUS: Your Honor, if I could do it, this chart represents all away games. Because the clearest example of a violation of the Controlled Substance Act is the taking of the controlled substances outside of the jurisdiction in which the registrant is allowed to distribute controlled substances from. It also is a violation of the Controlled Substances Act for trainers to dispense them.

So, this is as specific as it can be. It's got the date, it's got the team, it's got the name of the person who gave it to him. It says a trainer. Your Honor, the defendant clearly knows who the defendant -- the trainer was for the Bears on September 23rd, 1995.

THE COURT: All right. Let's pause here.

Let me ask Mr. Levy: All right, here's a specific example. What do you say to that specific example?

MR. LEVY: Well, I would say a few things, Your Honor. First, Mr. Closius is talking about violations of the Controlled Substances Act, and this and that.

Start with the fact that Mr. Graham is not a RICO plaintiff. He's one of the six plaintiffs who does not purport to bring a

RICO claim. So we have to -- we have to start with that premise.

THE COURT: We're talking about the state-law claim, anyway.

MR. LEVY: Under the state-law claims, I don't see any allegations that there was -- with -- that there was an admission -- omission here, there. Are no pleadings suggesting reliance. There are no pleadings suggesting causation.

You know, Mr. Graham had a career that lasted from 1991 to 2001. It looks like he was provided with one pill at a visiting team locker room, 22 years ago. There's no suggestion that if he had been -- that he had received a disclosure, the substance of which we don't know because it hasn't been alleged, that he would have reacted any differently, that he would've refused to take the medicine, that he would've refused to play in a game the next week.

THE COURT: All right. How do we know, for all this says, he got all the disclosures necessary in St. Louis?

MR. CLOSIUS: Your Honor, are we trying the facts? I mean, this is a pleading, Your Honor. I mean, if we're going to get into --

THE COURT: You have to meet 9(b).

MR. CLOSIUS: And 9(b) states that we have to say that he had a disclosure?

THE COURT: Yeah.

MR. CLOSIUS: That's a fact. That's an issue of fact.

THE COURT: No. Look. 9(b) says what it says. Give me where in the complaint there's something more specific than this about what happened on that occasion.

MR. CLOSIUS: Your Honor, if we turn to Page 23, and Paragraph 114.

THE COURT: Wait. I want to be there. 23, what?

MR. CLOSIUS: Paragraph 14. 114, I'm sorry.

THE COURT: Okay, 114.

"Examples of these omissions include..."

All right.

MR. CLOSIUS: Examples of omissions.

THE COURT: Uh-huh.

MR. CLOSIUS: Here you have ten pages, from every named plaintiff.

THE COURT: All right. So show me where this instance about the Ambien is fleshed out.

MR. CLOSIUS: That's a different -- it's a different thing, Your Honor. Now I'm talking about the omissions. I thought you wanted me to tell you where the state law omissions -- there are three different parts of the complaint here, with specific --

THE COURT: I guess what I'm asking you is: Where are the details of the event in St. Louis with the Ambien fleshed out? So I can -- for all we know, in that instance, he got all the disclosures necessary.

MR. CLOSIUS: That's the detail we have in the complaint,

Your Honor. With regards to that incident.

THE COURT: All right. So that's it.

So now let me go back to Mr. Levy for a minute. What do you say to the Controlled Substances Act, and whether or not trainers are allowed to hand out Ambien?

MR. LEVY: I think that's unsettled, Your Honor. We're going to contest the notion that that -- the Controlled Substances Act prohibits trainers from handing out Ambien in circumstances -- especially in circumstances where doctors are nearby, and have written a prescription, or have authorized the dispensation.

But putting that -- to be honest, that's not -- if such an incident occurred, it's not an omission; it's not a fraud; it's not concealment. And it cannot support the notion that there's been a violation of state law here, because there haven't been adequate disclosures of -- there haven't been adequate allegations of what the required disclosures should entail, and that the player relied on those -- would have -- that the player would have relied on those disclosures, if they had been made to him.

THE COURT: Just focusing -- let me ask Mr. Closius.

Just focusing on the state-law misrepresentation claims, which is what I'm thinking about now, or omissions claims, how does the fact that a trainer, rather than a doctor, gave him the Ambien in any way support a -- a misrepresentation claim? Under

state law.

MR. CLOSIUS: It's omitting to tell them that what they're doing is illegal. It's a fraud.

THE COURT: I don't know. That --

MR. CLOSIUS: They're pretending that their trainer --

THE COURT: Let's say you're right on the law -- I don't know if you are or not -- but that a trainer can't do that.

MR. CLOSIUS: Your Honor, I can --

THE COURT: How does it -- so, so, let me back up.

Let's say I go to the doctor's office, and I need some medicine. And the doctor is somewhere hanging around in the office, but it winds up being the receptionist that gives me the -- the pills. And I take them.

So under your theory, that receptionist has committed a state-law violation by failing to tell me that she is not authorized to hand me those pills under the -- she's violating the Controlled Substances Act.

MR. CLOSIUS: The pills are a controlled substance, I assume?

THE COURT: Yeah. Let's say they're antibiotics or something. Painkillers. But, yeah.

To me -- I don't know. To me, that might be a violation of the Controlled Substances Act. But I don't see how that automatically turns into a misrepresentation claim.

MR. CLOSIUS: Your Honor, if it's in the presence of a

doctor, in a doctor's office, the doctor's there, somebody else can probably give the pill and that would be okay.

But when it's happening on a continual basis outside the presence of the doctor, when it is a course of conduct, that's a different issue. That's back to the volume.

When they're giving out pills at the volume they're giving out, when the trainers are doing it, when it's not subject to prescriptions, when there's no doctor-patient relationship, that's an omission. That's a fraud. Again --

THE COURT: Well, what is the exact omission? That they're violating the Controlled Substances Act?

MR. CLOSIUS: Correct. The omission is that the trainer is not authorized to do this.

Again, Your Honor, these are 20-year-old players. I mean, defense is quoting before as if the players are supposed to know the Controlled Substance Act.

The players have no idea whether any of this is valid or not. They don't know. They're football players, Your Honor.

THE COURT: Is there a decision by our Court of Appeals or the Supreme Court that says that you have to make a disclosure that you're violating the CSA, Controlled Substances Act; and if you don't, that that's a violation of the state law about misrepresentations?

Let's just take California. Is there --

MR. CLOSIUS: Not off the top of my head.

THE COURT: I'm not familiar with any such law.

MR. CLOSIUS: Not off the top of my head, Your Honor.

THE COURT: To me, I don't see how -- it would have to be, under your theory. And yet, you have no authority for that position.

MR. CLOSIUS: Under the state-law claim, that's not the core of our case, Your Honor. The core of our case is, is that the omissions were regarding side effects, instructions, dosages. The things that they were clearly required to disclose under both statutes.

THE COURT: But you don't say that in the Chicago Bears instance. That's what I'm trying to get at.

MR. CLOSIUS: Your Honor, because that was --

THE COURT: If you say that against some other teams, maybe you do a better job there.

But, you know, it's not my fault that you took on the burden of suing 32 clubs. And just because you took on and bit off so much doesn't give you the right to cut corners. You've still got to prove -- you've got to plead your case against all 32.

MR. CLOSIUS: Your Honor, the chart we looked at was the RICO chart. On Page 23, starting at 114, and going on for ten pages, every named plaintiff --

THE COURT: Yeah. Where's the Chicago Bears instance there? Let's look at that. Paragraph 114. Let's find out what you say about the Chicago Bears there.

MR. CLOSIUS: Your Honor, I'm not -- seeing a lot of teams, but I'm not seeing the Chicago Bears on my quick look through.

THE COURT: All right. So what am I supposed do? Just shrug my shoulders and say: Well, maybe discovery will prove something, so it's okay for you to violate Rule 9(b) because you're representing heroes of our sports industry?

MR. CLOSIUS: No, Your Honor.

THE COURT: Is that what I'm supposed do?

MR. CLOSIUS: Your Honor, what you're supposed to do -- and the cases are clear on this -- with regards to both RICO and the state laws with regards to 9(b) and with regards to Rule 8, if you find that we haven't been specific enough, you should allow us to amend, unless you conclude as a matter of law that we can't possibly cure it.

THE COURT: How many times do you get to amend?

MR. CLOSIUS: Your Honor, the Ninth Circuit said once that when somebody did five amended complaints, that that was too much. RICO, we've only done once. The state-law claim, it's now twice. I don't see case law saying that that's excessive.

And the important point to make here, Your Honor, and this is really crucial: In the briefing, the defendants referred to we had extensive discovery at the time we filed the amended complaint. That's just not true.

At the time we filed the amended complaint, we had conducted two depositions, and we had gotten a lot of data from the

defendants, but we weren't even 10 percent of the way through them.

At this point in time, we have conducted over 20 depositions. We've also gotten over two thirds of the way through the data.

We can amend this to any degree of particularity you want at this point, Your Honor. The defendants have -- we have over 750 documents that we have now identified as hot documents.

I brought -- if we're going to get into discovery, I brought 10 documents (Indicating) that have been produced since we filed it, that will give you some indication of what is going on. If you want to see it --

THE COURT: Have you got one on the Chicago Bears there?

MR. CLOSIUS: I don't think I do, Your Honor. I was hoping you would pick the Forty-Niners, Your Honor.

THE COURT: Let's hear what you've got on the Forty-Niners. Read to me one of the emails, or whatever document you got.

MR. CLOSIUS: I was kidding about the Forty-Niners, Your Honor.

THE COURT: Well, what have you got? Just read one. I don't want to read ten. Just give me one, and read it out loud.

This is not under some protective order, I hope.

MR. CLOSIUS: Of course, it is.

THE COURT: Well, if it is, then I'm going to -- I don't like this. I don't like the idea that all this bad conduct gets

swept under the rug.

What's going on, Mr. Levy? There's no justification. This is the public out there; they're entitled to know what is going on in my cases.

How come this would be under a protective order?

MR. LEVY: Your Honor, it's difficult for me to answer that question without seeing the document.

THE COURT: All right, show him the document.

MR. LEVY: I understand your concerns.

THE COURT: We're not going to hide -- that's what goes on in arbitration. The public doesn't get to see. It's all hidden from public view. But these courts belong to the United States and to the public. So the public's going to get to see what we do here.

So look at that document, and tell me if there's something in that that deserves to be under a protective order.

(Off-the-Record discussion between counsel)

MR. LEVY: Your Honor, I concur that that -- there's no reason for that to be marked "Confidential."

THE COURT: All right. Please read to me and to the public anything in there that you think shows what's, quote, really going on, close quote.

MR. CLOSIUS: Your Honor, this is from -- this is related to the Atlanta Falcons. This is a memo.

THE COURT: Give us the date, please.

MR. CLOSIUS: The date is May 18, 2010.

THE COURT: Okay.

MR. CLOSIUS: As read:

"Within the first two days on my job..."

THE COURT: Whoa, whoa, please slow down. No one can follow it.

MR. CLOSIUS: Sorry.

THE COURT: Read it slowly and distinctly.

MR. CLOSIUS: From the trainer (As read):

"Within the first two days on the job, I was informed that we barely missed a DEA investigation because of improper billing issues. Sport Farm..."

The place that provides the drugs.

"...informed us (Inaudible) of their major concerns..."

(Reporter interruption)

THE COURT: I told you to slow down, and you did it again.

MR. CLOSIUS: I'm sorry. In my world, you hear slow.

"...high inventory of medication on site which can lead to high return of unused medication, poor control, excessive dispensation, and an unnecessary increase in the budget. High dispensation of narcotics and regular medication, compared to other clubs. This creates a culture of dependency and goes against healthy lifestyles and care, even for an NFL

player. My concern is also with these players at the end of their careers going through medical issues, and also the ease of access to media outlets that can provide them with an opportunity to say they abused and are now addicted to medications. After Mary-Ann Fleming, director of player benefits at the NFL League office reviewed our issues with Sports Farm, her recommendations were to start clean on all levels including a new team physician, a new head trainer, and a new pharmacy account number. Over-spending in regards to medications. We were informed on average, NFL team spends about $30,000 a year per prescription. We spent 81,209 between two pharmacies. Please review."

Next one --

THE COURT: Wait. One's enough. One's enough. We can't go through --

MR. CLOSIUS: They're short, Your Honor. My only point is: These are email chains involving the trainer, the general manager, the owner and the president.

Let me read one short one, if I would.

THE COURT: All right, one more.

MR. CLOSIUS: This is from Rich McKay, the president, to Elliot Pellman, an NFL doctor (As read):

"Here is an exchange that I am not happy with. This

is Jeff Fisher trying to get after Scott. My question is Mary-Ann Fleming recommending the replacement of our doctors. I need to know, is this really true, and does she realize that the on-site trainer is really the one in control? I need to keep this confidential. Rich."

THE COURT: Okay. So where -- how much more discovery do you think you will be -- if all 32 stay in the case, are you 100 -- 90 percent of the way with discovery? Fifty percent? Thirty percent? Where do you think you are?

MR. CLOSIUS: We are two-thirds of the way going through the documents-- well, sorry, we're further than that. We're 70 percent of the way through the documents, Your Honor.

I'm confident that if we are given the right to amend, we can be as particular as you want. Remember, Your Honor, they have all the information. I mean, as we assessed all this --

THE COURT: But I don't have it.

MR. CLOSIUS: I understand that.

THE COURT: And the file has got to have it. That's not enough, that they have it.

MR. CLOSIUS: My only point is, assuming they've complied, they've given it to us. So we now have medical logs, we have --

THE COURT: How come you haven't taken all the depositions yet?

MR. CLOSIUS: Your Honor, time has been an element. We are

trying to do as best -- we've taken a lot of them, Your Honor. We have a lot of depositions --

THE COURT: Two. You said you had --

MR. CLOSIUS: No, Your Honor, I said we had two at the time we filed the amended complaint. We've taken --

THE COURT: How many have you taken since then?

MR. CLOSIUS: I believe we're about 22.

THE COURT: You've done 22. Okay. Have you --

MR. CLOSIUS: We are moving at the speed of light, as far as I can tell, Your Honor. Co-counsel may agree with that.

THE COURT: All right. Well, I will say this. You are moving faster than your ordinary case because I can't get the lawyers in an ordinary case to move along. They always have some excuse for not taking depositions. So good for you, that you have taken 22 depositions.

MR. CLOSIUS: Your Honor, you also understand, we are going through over 100,000 pages of documents here. I mean, we're through them, about 70 percent. So we are confident that --

THE COURT: Who is the "we" now? You've got helpers?

MR. CLOSIUS: I don't do it personally, Your Honor. It's Silverman Thompson Slutkin & White, and also a firm called Robbins Geller.

THE COURT: All right.

MR. LEVY: Your Honor, can I be heard on the issue of prejudice? Dismissing with prejudice?

THE COURT: Well, I -- why, why should I do that? Why can't I give them an opportunity to replead?

MR. LEVY: Let me give you one reason. And the flip side of the coin is that by next week, we will have taken the depositions of ten plaintiffs. Without disclosures, without -- I don't know what's coming here.

We have been moving along expeditiously in reliance on and having available only the allegations of the amended complaint. The second amended complaint.

And if -- if we want -- if we want to be candid about this, this is really the fourth opportunity that they've had, because the same lawyers, bringing very, very similar claims in substance, had two opportunities to file in the *Dent* case.

So, you know, there are numerous holdings, and we've cited some in our -- in our reply paper, that basically a plaintiff is not freely entitled to more than one bite at the apple in terms of allegations and amending its pleadings.

And we'd urge you to draw the line here.

THE COURT: Well, I see both sides have good points on this. Where does it stand on the appeal in the *Dent* case?

MR. LEVY: Your Honor, my understanding is that the appeal has been argued, and it's under submission in the Ninth Circuit.

MR. CLOSIUS: Oral argument was on December 16, Your Honor. And when the opinion comes out is up to the Ninth Circuit.

THE COURT: What is the chance that the -- the Court will

address not only the allegations there, but the allegations here? Is there any remote chance that that would occur?

In other words, that the Court of Appeals will give us guidance not only in that case, but in this case?

MR. CLOSIUS: They only dealt with preemption, Your Honor.

MR. LEVY: I concur. I think it is very unlikely.

THE COURT: All right.

MR. CLOSIUS: Although Judge Kozinski did say it sounds like a RICO case. From the bench.

THE COURT: You're making that up.

MR. CLOSIUS: I'm not making it up, Your Honor. You can watch the tape.

MR. LEVY: I laughed when I heard it as well, Your Honor. I laughed. Judge Kozinski is --

THE COURT: Well, good for Judge Kozinski.

MR. LEVY: -- known for making similar characterizations.

THE COURT: Good for him.

All right, I'm bringing this to a close, but I'll let each of have you two minutes to make your last pitch on whatever else you want to say. And then we're going to bring it to a close.

Okay, Mr. Levy.

MR. LEVY: Okay. Your Honor, I started with the RICO count, and that's where I'm going to end.

The RICO claim is barred by the statute of limitations as well as by failure of the plaintiffs to allege proximate cause.

And the fact that if they had alleged proximate cause, any suggestion that there was a causal link between inventory controls of the kind that was referenced in the Falcons document that Mr. Closius just gave to you and any plaintiffs' particular injury is almost laughable.

The RICO claim should be dismissed. The class action allegations, the class allegations should be dismissed along with them, because the only claim for which plaintiffs have sought class certification and brought class allegations is the RICO claim. And the state-law claim should be dismissed with prejudice as well.

THE COURT: Wait. I thought the state-law claim were asserted as a class, too.

MR. LEVY: They're not, Your Honor. I'd invite your attention to Paragraph 9 of the amended complaint, which makes very clear that the plaintiffs are seeking class treatment only for the RICO claims, and not for the others.

And if you look at the headings of each of the sections of the complaint, it will also make clear that the plaintiffs are bringing --

THE COURT: Wait.

Is that right, Mr. Closius?

MR. CLOSIUS: No, Your Honor, it is not.

THE COURT: Well, let's --

MR. CLOSIUS: Our intent is to bring the RICO claim as a

23(b) claim. And our intent is to bring the state-law claim as a 23(c)(4) claim, which is essentially --

THE COURT: Is that stated clearly in your document? Or is there a goof there?

MR. CLOSIUS: It is, Your Honor. And I don't have it marked.

THE COURT: Where is it stated?

MR. CLOSIUS: I don't have it marked, Your Honor.

THE COURT: Uh-huh.

MR. LEVY: Your Honor, I would invite your attention to Paragraph 9 of the amended complaint, and urge you to read that.

THE COURT: Well, let me look at it.

MR. LEVY: Yeah.

THE COURT: 9 says (As read)::

"All of the named plaintiffs...bring intentional misrepresentation, civil conspiracy..."

Et cetera, et cetera.

"...and a nationwide class of plaintiffs bring claims under Racketeer Influenced..."

Well, that does seem to say what Mr. Levy says it says. So where do you save the day with some other -- where are your class allegations?

MR. CLOSIUS: I don't have it, Your Honor. I know at one point we talked about 23(c)(4) status for state-law claims. If we're talking about 23(b)(3), he's correct. And that was what

that paragraph was supposed to be related to.

THE COURT: Well, but where do you say the state-law claim are being brought -- here, Page 70 says "Class allegations." Paragraph 267 (As read):

"Plaintiffs bring this action on behalf of themselves and all other similar situated...Rule 23, consisting of all Players, which for class purposes, shall mean anyone listed on one of the Clubs' rosters..."

Blah, blah, blah, blah, blah.

MR. CLOSIUS: Your Honor, I have it. If you go to Page 74.

THE COURT: Which one?

MR. CLOSIUS: Go to Page 74 and go to Paragraph 277.

THE COURT: Okay.

MR. CLOSIUS: (As read):

"This action is also properly maintainable as a class action under Federal Rule..."

(Reporter interruption)

MR. CLOSIUS: I'll go slower.

THE COURT: I know.

MR. CLOSIUS: 277:

"This action is also properly maintainable as a class action under Federal Rule 23(c)(4) in light of the nature and extent of the predominant common particular issues, exemplified in the common questions set forth above, generated by Defendants'

consistent agreement, and consequent consistent policy, of promoting and facilitating the use of the medications."

THE COURT: All right. But, look --

MR. LEVY: But then, Your Honor, I would urge you to go on and look at the heading on Page 74. "COUNT I - RICO" referenced to the "Nationwide Class." Looking at the bolded language on Page 74.

THE COURT: Yeah.

MR. LEVY: You see it's -- there's a reference to the "Nationwide Class" at the heading of that count.

THE COURT: No, I don't see that.

MR. LEVY: Well --

THE COURT: Oh, I see it, yes. After all the names.

MR. LEVY: And then if you turn the page to Page 89, you look at the heading on the Intentional Misrepresentation claim. There is no reference to a class.

And the same is true on Page 94. The heading on the Concealment claim.

THE COURT: So what do you say to that, Mr. Closius?

MR. CLOSIUS: Your Honor, I think you should be reluctant to rule as a matter of law that we can't cure that. We can change the headings, if we need to.

THE COURT: But on the other hand, Mr. Levy, it's true that the heading doesn't say "class." But then, if you look at the

allegations, it refers thereunder to "class members."

MR. LEVY: It does refer to "class members," Your Honor. But go back and look -- I rest on Paragraph 9, which I think is telling and conclusive. It is very hard to read Paragraph 9 without concluding that the class is asserted only with respect to the RICO claims.

THE COURT: Okay. I didn't give you your two minutes. You get two minutes.

MR. CLOSIUS: Your Honor, these claims are not -- the RICO claims are not barred by the statute of limitations. And even though it's only a District Court, I would advise to you look at the case -- Judge Ware's opinion in *Ward versus Chanana*. It's clear. It reviews the applicable Ninth Circuit cases also.

With regard to the body of the RICO claim, there's not a substantial disagreement here, Your Honor. If statute of limitations is done, I think this is a classic RICO claim.

We have an enterprise. We have participation by everyone. We have a committee referred to as the NFL Prescription Drug Advisory Committee. There's no parallel conduct here, Your Honor. These are people talking all the time. They're forming committees about the drugs. It is a classic RICO conspiracy.

With regards to the state-law claims, again, the disclosures are mandated by the statute. They have no choice. The players have to use these doctors. They have to sign agreements that

they won't see any other doctors.

So there's a relationship, a fiduciary duty here. Your Honor, the cases are also clear, under both RICO and the state-law claim, that you should grant us an opportunity to amend.

If you disagree with me, if you don't think we've met Rule 9(b) and we haven't met Rule 8, then the cases are clear that you should grant us an opportunity to amend unless, as a matter of law, you conclude we can't fix it.

I'm again asserting that the discovery that's happened since the amended --

THE COURT: That can't be the test because, look. There are cases where I have said or many judges have said: Okay, it's time for you to plead your best case. So they plead, they fail, it gets dismissed. And they just don't get another try.

You don't have to say there's no -- there's no scenario under which they might be able to fix it somehow. That's an impossible test for me to apply. But I give you a reasonable number of tries, and if you can't get it together, then too bad, you -- it's over. I don't believe you're telling me the right standard.

But that's not to say I shouldn't give you the leave to amend, but the test is not that I have to somehow conclude, as a matter of law, that you can never plead it correctly.

MR. CLOSIUS: Your Honor, I'm just --

THE COURT: That's impossible.

MR. CLOSIUS: I'm just quoting cases, Your Honor.

THE COURT: All right, all right. I'll look at your cases.

MR. CLOSIUS: But Your Honor -- we thank you for your time.

THE COURT: Okay. Is that it?

MR. CLOSIUS: Thank you.

MR. LEVY: Yes, Your Honor. Thank you.

THE COURT: Thank you. It's under submission.

(Proceedings concluded)

CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Belle Ball

Friday, February 10, 2017

Belle Ball, CSR 8785, CRR, RDR